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In The

Supreme Court of the United States

October Term, 1984

LA-Z-BOY CHAIR COMPANY,
Petitioner

v.

WORLD OF SLEEP, INC.,
Respondent/Cross Petitioner

CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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10 pp

QUESTIONS PRESENTED

1. Whether the *Monsanto v. Spray-Rite* standard requiring evidence tending to exclude the possibility of independent action by alleged conspirators in dealer complaint cases must be applied to the preliminary determination of the existence of the conspiracy in order to admit a co-conspirator's hearsay statement under Fed. R. Evid. 801(d)(2)(E).

2. Whether evidence of an agreement to "keep price up" between a manufacturer and a dealer who was in a price war with a discounting dealer, was some proof that another dealer was part of a conspiracy to maintain prices where the second dealer had specifically sought the elimination of the price competition offered by the discounting dealer.

3. Whether evidence of the existence of a price fixing agreement admissible against one party to the agreement, coupled with evidence that the other party kept his prices up, is sufficient to allow the use of a co-conspirator's hearsay statement and to overcome a motion for summary judgment.

4. Whether the evidence supported the jury verdict in favor of World of Sleep based on an unlawful price discrimination under the Robinson-Patman Act.

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CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Cross Petitioner, World of Sleep, Inc. (World of Sleep), requests that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Tenth Circuit entered on March 4, 1985. The cross petition is directed to Sections III A and B and Section IV of the Tenth Circuit opinion. Section III A affirmed the summary judgment granted in favor of Mauldin and III B reversed the trial court's denial of Montgomery Ward's motion for directed verdict. Section IV reversed the jury verdict in favor of World of Sleep which was based on a violation of the Robinson-Patman Act.

La-Z-Boy Chair Company has petitioned this Court to review Sections III C and D of the opinion which held La-Z-Boy was involved in a price fixing conspiracy with Mauldin and that it was a per se violation. La-Z-Boy contends resale price maintenance cannot occur in the absence of a specific price being set and that resale price maintenance conspiracies should be judged by the rule of reason.[1]

———o———

[1] Parties other than Petitioner and Cross Petitioner are Montgomery Ward & Co., Arthur Mark Mauldin, individually and d/b/a La-Z-Boy Showcase Shoppe. World of Sleep, Inc. has no parent company or affilitiates which are not wholly owned.

OPINION BELOW

The opinion of the Court of Appeals is reported at 756 F.2d 1467. It also appears in the Appendix hereto at 1a to 29a.

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JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) to seek review of a Court of Appeals decision involving the federal antitrust statutes.

(i) The judgment of the Court of Appeals was entered on March 4, 1985.

(ii) Rehearing was denied by the Tenth Circuit Court of Appeals on April 9, 1985.

(iii) Cross Petitioner relies on Supreme Court Rule 19.5 in filing its cross petition. The petition for certiorari was received on June 12, 1985.

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STATUTES AND RULES INVOLVED[2]

1. Section 1, Sherman Act, 15 U.S.C. § 1.

2. Section 2, Robinson-Patman Act, 15 U.S.C. § 13(d) and (e).

3. Section 4, Clayton Act, 15 U.S.C. § 15.

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[2] These provisions are set out verbatim in the Appendix, pp. ——.

4. Fed. R. Evid. 104(a).

5. Fed. R. Evid. 801(d)(2)(E).

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STATEMENT OF THE CASE

Proceedings

World of Sleep filed its complaint alleging that defendant La-Z-Boy, a reclining chair manufacturer, and two of its dealers, defendants Montgomery Ward & Company and Mauldin Corporation, had conspired to prevent World of Sleep from continuing to sell La-Z-Boy chairs in violation of § 1 of the Sherman Act, 15 U.S.C. § 1. Jurisdiction was based on 15 U.S.C. § 15. The complaint was amended to add a Robinson-Patman, Section 2(e) violation on the basis it did not receive the same advertising allowances granted to Montgomery Ward. All defendants denied the allegations of the conspiracy, La-Z-Boy also denied the price discrimination and asserted various state and federal counterclaims against World of Sleep and its President, Tom Hansen. The counterclaims are not in issue in the petitions for review. Mauldin was dismissed on summary judgment, and the jury returned a verdict in favor of La-Z-Boy and Montgomery Ward on the Sherman Act claims, and in World of Sleep's favor on the Robinson-Patman claim. The Tenth Circuit Court of Appeals reversed and remanded for a new trial, holding that the allegations involved a vertical price fixing conspiracy between La-Z-Boy and Mauldin but not between La-Z-Boy and Montgomery Ward, and that a *per se* instruction was required by this Court's decision in *Man-*

santo Co. v. Spray-Rite Service Corp., 465 U.S. —, 104 S. Ct. 1464 (1984). The Tenth Circuit also affirmed the grant of summary judgment for Mauldin and reversed the Jury award for World of Sleep on the Robinson-Patman claim.

FACTS

World of Sleep started buying La-Z-Boy chairs for retail sale in the Denver area in mid 1974. World of Sleep's chair sales in that partial year were only 1240. However, World of Sleep's entry to the market, with its competitive pricing and advertising, caused the total Denver market to increase by almost 3000 chairs, an increase of nearly 72 percent. La-Z-Boy's Colorado sales representative, Robert Reau, stated World of Sleep gave him the best years of his life (Tr. VIII, 1265).

In 1972 and 1973, the two years before World of Sleep entered the chair market, Montgomery Ward had been by far the largest volume La-Z-Boy dealer in Denver, commanding a 34 and 39 percent share of the Denver market. The first year of head to head competition between Montgomery Ward and World of Sleep (not a full year of sales for World of Sleep), Montgomery Ward's share of the market dropped to 30 percent while World of Sleep claimed an 18 percent share. In the next year, 1975 (the only full year of selling La-Z-Boys by World of Sleep), World of Sleep's share jumped to 54 percent and Montgomery Ward's share dropped to 25 percent.[3] (Ex. 35C)

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[3] In the following year, 1976, Showcase Shoppe, opened and became the second largest volume dealer in Denver. That is the

(Continued on following page)

World of Sleep's success in selling was grounded in its frequent advertising of name brand products such as Sealy, Simmons and La-Z-Boy (Tr. III, 248-65). In the fall of 1975, World of Sleep compared its La-Z-Boy prices to Montgomery Ward's prices on television (Tr. III, 306-7). Montgomery Ward complained about the advertising to La-Z-Boy (Tr. VII, 1047). Hansen, President of World of Sleep, testified that La-Z-Boy told him to stop the advertising, which Hansen did (Tr. III, 307-8).

In March 1976, Art Mauldin opened a La-Z-Boy Showcase Shoppe, carrying a line of La-Z-Boys nearly identical to World of Sleep's line up of chairs. Shortly thereafter World of Sleep renewed its comparative price advertising showing Showcase Shoppe's and Montgomery Ward's high prices next to World of Sleep's low prices. (Ex. 198, Ex. 202). World of Sleep also announced in its advertising a "Price War on La-Z-Boys" (Ex. 273, 275, 286).

One of World of Sleep's ads comparing a Montgomery Ward high price to World of Sleep's low price was sent by the Montgomery Ward Denver District Merchan-

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(Continued from previous page)

year World of Sleep was put on a credit hold and denied chairs for several months. The market shares became: World of Sleep, 28 percent; Showcase Shoppe, 27 percent; and Montgomery Ward, 21 percent. In 1977, when World of Sleep was almost completely out of the market, the shares were: World of Sleep, 12 percent; Showcase Shoppe, 41 percent; and Montgomery Ward, 32 percent. In 1978 through 1980, World of Sleep was not in the market at all, Showcase Shoppe's share of the market ranged from 50 to 45 percent, and Montgomery Ward's share was 35 to 41 percent. The overall Denver market dropped and leveled off after World of Sleep was terminated as a dealer. (Ex. 35C)

diser, Gene Spilo, to Montgomery Ward's National Chair Buyer, Al Weissenstein, in Chicago. The ad was dated March 31, 1974; a note was attached which said, "Look what's happening in Denver". Spilo said that "instead of competing with World of Sleep, I took one of their ads and sent it to Chicago" (Tr. VII, 973). He said there wasn't anything particularly wrong with the ad, just that it referred to the point that Montgomery Ward's price was $100 higher (Tr. VII, 975-6). Weissenstein's description of the ad was, "[T]hey took a Ward's catalog page, blew it up in the newspaper and said 'Here is Ward's price, and here is our price.'" (Tr. VI, 913).

Weissenstein testified he called Robert Rall, La-Z-Boy's National Marketing Manager, and said "can't you tell the guy (Hansen) not to run our ads in the paper" (Tr. VI, 915). Rall told Weissenstein he would talk to the guy. Rall later reported to Weissenstein that he (Hansen) would stop (Tr. VI, 915). According to Gary Schroeder, La-Z-Boy's Vice President-Marketing, La-Z-Boy's normal policy was to not interfere with dealers' advertising (Tr. VII, 1026-27). Rall confirmed Weissenstein had called him about the ad that had been sent to him by the Denver office (Tr. VIII, 1127).

Montgomery Ward was La-Z-Boy's largest buyer. At that time its volume with La-Z-Boy was approximately $12,000,000 per year (Tr. VII, 1082, Ex. 4). According to Spilo, La-Z-Boys were the "top of the line as far as action chairs" (Tr. VII, 973) and were a significant part of Montgomery Ward's program in Denver (Tr. VII, 984).

Spilo admitted that he didn't want to engage in a price war with World of Sleep because it would hurt Montgomery Ward's profit (Tr. VII, 983). He also stated

that it was hard for Montgomery Ward to compete with World of Sleep because Montgomery Ward was such a large organization (Tr. VII, 997).

Donald Hamm, Montgomery Ward's Merchandise Rebuyer employed at the Big Ticket Distribution Center in Denver, confirmed that Montgomery Ward did not drop its prices on La-Z-Boys in response to any of World of Sleep's ads (Tr. VIII, 1210). Although Weissenstein opined that using Montgomery Ward's name was not proper advertising by World of Sleep (Tr. VI, 936), Hamm admitted that one of Montgomery Ward's advertising practices was that in order to run a "50 percent off" ad to attract the customer, it simply increased its markup on the product (Tr. VIII, 1203-05).

In tape recorded conversations, Rall told Hansen on June 16, 1976:

> MR. RALL: You got me in a lot of trouble.
>
> MR. HANSEN: How did I get you in a lot of trouble?
>
> MR. RALL: I got at least forty-seven people beating me on the head and alongside of the head and one of them is kicking me in the ass and that's Montgomery Ward. The other ones—the other ones are all just mean people.
>
> MR. HANSEN: Just mean people. What have I done?
>
> MR. RALL: Well, you ran a little ad the other day —"World of Sleep declares price war on Lazy-Boy—"
>
> * * *
>
> MR. RALL: —before he got involved in Lazy-Boy Showcase shops, but I called him primarily to tell him that—you know—I was—I'm more concerned about

him than I am about you, but we're all very concerned about pricing at any time—you know—and I knew, of course, I was going to hear from Montgomery Ward, but I extracted a promise from Mr. Mauldin that he'd get his prices up and keep them up, which is illegal to even talk to him about, but I—I knew that if it carried on out there that we were all going to be in trouble, and him more than anybody else—

MR. HANSEN: Uh-huh.

MR. RALL: —because he has to rely upon Lazy-Boys to keep in business, but I'd kind of like to—I'd like to get it stopped. I don't want the same situation that we had in Phoenix, which was bad—I mean—you know—that was—there wasn't anything good about it. Schroeder was out there for four days trying to get it resolved, and seems pretty well to have everybody—you know—talking about making some money again, and then he was—where was he?—he was in Los Angeles, and Bob Reau called me and I called him about this ad, and he about shit, so—but at any rate, I told him I was going to call Art first and then call you, and I just—you know—I'd like to know your feeling on it. I'd like to know if—what it needs—what needs to be done, Tom, to stop a price war—what you want from us or what you expect from us—

MR. HANSEN: Well—

MR. RALL: —or what you want done there in the area.

* * *

(Tr. III, 343-44, 350-51; Ex. 2).

On June 23, Rall called Hansen (recorded again by Hansen) and said that he had just come from a lengthy meeting in Chicago with the Vice President of Montgomery Ward, Mr. Lutz:

MR. RALL: I'm in Chicago—

MR. HANSEN: Uh-huh.

MR. RALL: —and I spent—oh, I would say—one, two, three, four—four and a half hours in the vice-president's—Mr. Lutz's office. He's the vice-president of Montgomery Ward, and he's got your ad pinned up on the wall, and he almost pinned me up on the wall, too. You surprise me. I—you know—I thought maybe we'd be able to sit down and discuss things as far as the Lazy-Boy Showcase Shop is concerned, but I had no idea what you were going to do with the Montgomery Ward situation there, so—we're very much concerned about it now, Tom. We don't really know at this moment exactly what we're going to do. I presume that you know that we have your company on a credit hold now, and—you know—we can't ship you anything. Our plan is to leave you right there until we can figure out exactly what's gonna happen, and we're very sorry that any of this is happening.

* * *

But I really wanted to tell you that I took a beating over there. I'm responsible for Montgomery Ward, and they know me real good, and I feel just a little bludgeoned right now. I'm calling—I promised you I'd call, so I'm calling, but I'll get back to you after I get back home. I'm still in Chicago, and after I get back home and get a chance to sit down and talk to Gary, I'll call you back then—

* * *

MR. RALL: I don't know. I'm going to call you Friday. What I want—I don't know what Gary's schedule is. Gary is not there right now, and he won't be there tomorrow, and he didn't come here to Chicago, so I don't really know what the devil his schedule is. I talked to him about the Montgomery Ward ad—you know—I mean, about the ad that you

> ran with Montgomery Ward in it. I mentioned that to him this morning because he knew that they had called me for a command performance to come over there today, so he did not say anything about it that meant anything. He just said, "Well, let's wait till you get back, and we'll talk about it Friday." I asked him then if he knew what his schedule was, and he said he'd rather talk about it on Friday, so I don't know exactly what it is.

(Tr. III, 362-63; Ex. 3).[4]

The credit hold Rall spoke of was imposed because World of Sleep was not paying for chairs within 30 to 45 days after delivery. World of Sleep said the reason for the nonpayment was because La-Z-Boy was sending chairs before the delivery dates requested by World of Sleep (Tr. III, 370). Schroeder admitted deliveries were a problem for all of its dealers (Tr. VII, 1040). A meeting was set up between Rall and World of Sleep for late June to reconcile the World of Sleep account but when Rall showed up at World of Sleep's office with La-Z-Boy's Colorado representative and Rall's assistant, the credit hold was not discussed. World of Sleep was led to believe deliveries would resume (Tr. IV, 395-96). The past due amounts continued during June, July and August and were paid up in early September (Tr. V, 767-68).

La-Z-Boy claimed the reason for the nonpayment of invoices was because World of Sleep was having cash flow problems, had been losing money, and was overstocked. However, it is undisputed that when the pay-

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[4] There were a total of seven telephone conversations between La-Z-Boy and World of Sleep which were recorded by Hansen. All were admitted into evidence. (Exs. 1-7) Exhibits 2, 3 and 4 are set out in full in the Appendix, pp. ——.

ment problem was finally discussed, World of Sleep obtained certain credits from La-Z-Boy, and paid the amount due in full (Tr. VIII, 2327). There was no evidence that the payment made by World of Sleep came from borrowed funds, or that the checks bounced.

Gorden Sauer, La-Z-Boy's Credit Manager, testified that because the credit hold had lasted for more than three months it was La-Z-Boy's policy to limit deliveries to 60 chairs at a time (Tr. XIII, 2322). The policy could not be identified in any of La-Z-Boy's written policy manuals (Ex. 31b, 32). Later the 60 chair limit was changed to a one carload (approximately 220 chairs) delivery basis, which meant the next carload would not be delivered until the last one had been paid for (Tr. XIII, 2326, 2328). The credit restrictions were sought by La-Z-Boy because Hansen had refused to give a financial statement, one of the first times La-Z-Boy ever tried to get a financial statement from a dealer (Tr. VII, 1044). By the time new chair orders were accepted by La-Z-Boy, the delivery dates had slipped to where no chairs were received by World of Sleep in time for the heavy Christmas selling season (Tr. V, 646). The credit restrictions prevented World of Sleep from engaging in volume buying and volume selling. World of Sleep's efforts to regain its momentum under the restrictive credit and delivery terms imposed on it failed. World of Sleep finally stopped buying La-Z-Boys in early 1977.

Before World of Sleep started buying chairs from La-Z-Boy in 1974, La-Z-Boy had developed two basic lines of recliners, one called the Charter line which was sold to World of Sleep and other independent dealers, and an Americana line which it had developed especially for chain

stores and larger department stores. There was, however, no essential difference between the two lines of chairs. Dealers buying the Americana line were given an advertising allowance by La-Z-Boy which ranged from $2.25 to $3.00 per chair during the period when World of Sleep was competing with Montgomery Ward on the La-Z-Boy line. World of Sleep did not receive an advertising allowance; Montgomery Ward did.

Although World of Sleep was selling more La-Z-Boys than its competitors, it was at very low margins (La-Z-Boy claimed that World of Sleep was selling below cost, a violation of Colorado statute; the jury found in World of Sleep's favor on that claim which was affirmed by the Court of Appeals) (App. 27a). World of Sleep's financial statements for the years it was selling La-Z-Boys showed a loss compared to profit both before and after the La-Z-Boy experience (Ex. 112c, 112d, 112e, 112f). World of Sleep's advertising expense was a significant percent of its nonfixed expenses (Tr. III, 255).

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REASONS FOR GRANTING THE WRIT

This court should grant review of Sections III A and B and Station IV of the opinion below for the following reasons:

1. The Tenth Circuit has applied the substantive law test announced in *Monsanto v. Spray-Rite* to a procedural law question for the admissibility of evidence. The Court of Appeals held that the preliminary determination of whether a conspiracy existed had to be judged by the

Monsanto standard in order to admit a co-conspirator's hearsay statement. The hearsay statements in question tended to prove Montgomery Ward and La-Z-Boy were not acting independently.

2. The Tenth Circuit departed from *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690 (1962), by "compartmentalizing" the conspiracy evidence into two conspiracies. It found sufficient evidence of a price fixing agreement between La-Z-Boy and Mauldin but failed to use that evidence as a factor in the broader La-Z-Boy, Montgomery Ward and Mauldin conspiracy.

3. A conflict among the Circuits exists regarding the use of hearsay under Fed. R. Evid. 104(a). The trial court and the Tenth Circuit did not use the statement "I extracted a promise from Mr. Mauldin that he'd get his prices up and keep them up" as part of the preliminary determination of a conspiracy involving Mauldin because it was hearsay as to Mauldin. Additional proof that Mauldin kept his prices up was held to be insufficient to allow admission of the statement and summary judgment in favor of Mauldin was granted and affirmed.

4. The Court of Appeals overturned the jury verdict based on a Robinson-Patman violation because World of Sleep had successfully competed with Montgomery Ward and concluded "antitrust injury" was not shown. The record showed World of Sleep was denied substantial advertising allowances that affected its ability to compete and seriously affected its cash flow and profits. World of Sleep's financial difficulties were, according to La-Z-Boy, the reason it terminated World of Sleep.

I. Misapplication Of Monsanto To The Co-Conspirator Rule

In Section C of Part III of its opinion, the Court of Appeals found sufficient proof of a price fixing conspiracy

between La-Z-Boy and Mauldin to give that question to the jury—as to La-Z-Boy's liability. In Sections A and B of Part III, the court concluded the conspiracy couldn't be proved against Montgomery Ward or Mauldin because their participation was not shown by independent proof of conspiracy apart from hearsay statements.

The Court of Appeals reasoned that *Monsanto* required "integration" with Fed. R. Evid. 801(d)(2)(E). In fact the court's integration was to superimpose the entire *Monsanto* standard on the "substantial independent evidence" requirement of the co-conspirator rule. In *Monsanto* the question of a co-conspirator's hearsay statement was not involved and the Court expressed a substantive rule of law that applied to the totality of circumstances to prove a conspiracy in a dealer complaint case.

As a result of the Court of Appeals' holding, some of the evidence which tended to exclude the possibility that the manufacturer and dealer were acting independently was excluded as hearsay because the conspiracy wasn't proved without it.

A. Sufficiency Of Evidence Under Monsanto That Tended To Exclude The Possibility Of Independent Action

There are numerous legally recognized indicia of conspiracy, all of which were proved in this case: motive to eliminate price competition, complaints about a price cutter, a close relationship between the time of the complaint and the action taken in response thereto, complaining dealer in a position to exert economic pressure on the supplier, use of supply as a lever to force compliance, action contrary to business interests, susceptibility of a complying dealer to supplier control, raised prices, even-

tual elimination of price competition, coercive tactics by the complaining dealer, and an agreement to "keep prices up". Only the latter two indicia were based on evidence that contained some elements of hearsay.

Some of the indicia more than others tended to prove Montgomery Ward and La-Z-Boy were not acting independently. Taken together all of the circumstantial evidence and direct evidence is overwhelming proof, under *Monsanto,* that a resale price maintenance conspiracy existed.

> Price fixing is
>
> Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group are in no position to control the market, to the extent that they raised, lowered, or stabilized prices, they would be directly interfering with the free play of market forces.

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 221, (1940).

In this case an actual, not inferred, agreement to fix prices existed: "I extracted a promise from Mr. Mauldin that he'd get his prices up and keep them up". In the context of this case, that meant to peg the price of La-Z-Boys at Montgomery Ward's pricing. There was proof tendered that Mauldin in fact kept his prices up; Montgomery Ward did not lower its prices, World of Sleep did not raise its prices, and the competition offered by World of Sleep is gone.

1. *Dealer complaints.* Under *Monsanto Co. v. Spray-Rite Services Corp.*, 465 U.S. —, 104 S. Ct. 1464 (1984), dealer complaints and action in response thereto is not by itself sufficient to establish a conspiracy, but the complaints themselves are probative. By that the Court is telling the lower courts, don't stop the inquiry by making

over simplistic characterizations of conduct. Is the "complaint" just a marketplace occurrence or does it rise to a level of attempted interference with market conditions.

> Price is the "central nervous system of the economy," and an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face.

National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978)

In the context of the circumstances surrounding the "complaint" in this case, Montgomery Ward clearly requested market interference with pricing and it got what it wanted: "Can't you get the guy to stop [price comparisons]? . . . I'll talk to him . . . He said he would stop". There is a "conspiratorial" meeting of the minds between Montgomery Ward and La-Z-Boy as to what was to be accomplished. 104 S. Ct. at 1471, n. 9. The request by Montgomery Ward and the response to Montgomery Ward by La-Z-Boy, along with the "talking to" that took place is evidence that neither Montgomery Ward or La-Z-Boy were acting independently to stop price cutting by World of Sleep.

2. *Motive to end price competition.* World of Sleep does not need to rely on an inference of illegal motive which can be drawn simply from the fact that World of Sleep and Montgomery Ward were competitors. *See e.g., Com-Tell, Inc. v. Dukane Corp.*, 669 F.2d 404, 412 (6th Cir. 1982); *American Dermatologists' Medical Group, Inc. v. Collagen Corp.*, 595 F. Supp. 79, 81 (N.D. Ill. 1984). Montgomery Ward expressed its intent that it did not want to compete with World of Sleep, it acknowledged that the competition would hurt its profits, and that it was hard to compete with World of Sleep, and that they did not in fact lower their prices to meet World of Sleep's prices. One unannounced expression of motive however comes from La-Z-Boy's figures that Montgomery Ward's market share was drastically cut by World of Sleep's competition.

3. *Existence and use of pressure by Montgomery Ward.* The fact that Montgomery Ward was La-Z-Boy's largest purchaser is undisputed. Its volume with La-Z-Boy was $12,000,000 per year. That Montgomery Ward used that position in making its request can be inferred from Rall's testimony that a meeting was held at Montgomery Ward to discuss World of Sleep's advertising (Tr. III, 362-63). Just how much pressure was put on La-Z-Boy is made clear by the tapes—hearsay as to what Montgomery Ward actually said, but not hearsay as to Rall's reaction: "I got pinned up to the wall; I took a beating over there; I feel a little bludgeoned right now". *See Blankenship v. Herzfeld*, 661 F.2d 840, 844 (10th Cir. 1981).

4 and 5. *Close relationship between complaints and reaction; use of supply as a lever to force compliance.* Timing and sequence of events is seldom overlooked. *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1265 (9th Cir. 1983), *cert. dismissed*, 104 S. Ct. 385. The offending price comparison ad that was sent by Montgomery Ward's Denver branch to the Chicago home office ran on March 31, 1974. The essential taped conversations were June 16 and June 23, 1974. "I presume that you know that we have your company on a credit hold now, and—you know—we can't ship you anything. Our plan is to leave you right there until we can figure out exactly what's gonna happen, and we're very sorry that any of this is happening" (Tr. III, 362-63). By the time the payment dispute was resolved and shipments in limited quantities began again it was too late for the Christmas selling season. *Monsanto v. Spray-Rite*, 104 S. Ct. at 1471, n. 10.

6. *Action contrary to business interests.* World of Sleep's entry into the La-Z-Boy market increased La-Z-Boy sales in Denver by 72 percent in the first year. Near-

ly all existing dealer sales increased. Rall admitted World of Sleep's competition was good for La-Z-Boy: "Q. Doesn't a price war where there's a lot of competition between dealers on the product tend to create more sales for that product? A. I would think so." (Tr. VIII, 1129). *See Edward J. Sweeney & Sons v. Texaco, Inc.*, 478 F. Supp. 243 (3rd Cir. 1980), *aff'd*, 637 F.2d 105, 114, *cert. denied*, 451 U.S. 911.

7. *Susceptibility of dealer to manufacturer's pressure.* Mauldin's La-Z-Boy Showcase Shoppe was dependent on La-Z-Boy for its one and only product. The Showcase Shoppe was a concept designed to protect La-Z-Boy's unique recliner in the years to come and it exercised close watch over their openings and operations (Tr. VII, 1024, 1027, 1037). This indicia, that a controlled dealer is more likely to submit to coercion than a noncontrolled dealer has little weight in light of the proof of the actual agreement to keep prices up. *AAA Liquors, Inc. v. Joseph E. Seagram & Sons, Inc.*, 705 F.2d 1203, 1205-06 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983). But since the direct evidence confirming that Mauldin was a party to that agreement is hearsay, it has probative value.

8. *Actual pricing in the market.* Showcase Shoppe's prices were raised, World of Sleep's were not raised, and Montgomery Ward's prices were not lowered. The fact that Mauldin kept his prices up was shown by World of Sleep's tendered evidence of a survery of his advertising after the date of the promise. This evidence was rejected by the trial court as a result of its ruling on Mauldin's summary judgment motion.

9. *Elimination of a price cutter from the market.* The end result of the plan to leave World of Sleep on credit hold was that World of Sleep couldn't buy enough chairs to enable it to sell at discount. Without its competition

those discount prices were no longer available to the consumer and the consumer reacted by not buying as many chairs. The Denver market dropped 21 percent. Although before *Monsanto* the various circuits disagreed on the inferences to be drawn from dealer complaints, there was no question that the termination of a price cutter is a price fixing conspiracy. *See, e.g., Bosch, Inc. v. Star Cooler Corp.*, 671 F.2d 1168, 1171 (8th Cir. 1982).

The Tenth Circuit's example of independent action which would not amount to a conspiracy ignored much of the evidence noted above:

> "If Montgomery Ward independently set its own prices, and if La-Z-Boy unilaterally decided to terminate World of Sleep for refusing to keep its prices up no conspiracy existed between Montgomery Ward and La-Z-Boy . . . World of Sleep presented no other evidence that La-Z-Boy sought and received Montgomery Ward's agreement to maintain prices, or that Montgomery Ward sought and received La-Z-Boy's agreement to coerce other dealers to keep their prices up."

(App. 15a).

There is no doubt that Montgomery Ward set its own prices and World of Sleep does not contend otherwise. However it couldn't be clearer that Montgomery Ward's ability to act independently in setting its own prices was of no use to it in competing with World of Sleep. It wasn't La-Z-Boy that sought and received Montgomery Ward's agreement to maintain prices; it was vice-versa. And it was not necessary for Montgomery Ward to dictate each and every step of the conspiracy in order to be liable as a conspirator. *United States v. Adams*, 759 F.2d 1099, 1114 (3rd Cir. 1985).

La-Z-Boy has never contended that they terminated World of Sleep for refusing to keep its prices up. Rather their contention has been it was because of credit prob-

lems. Doing nothing for more than three months to resolve a credit problem with its second largest independent dealer in the country was hardly in La-Z-Boy's best interests.

La-Z-Boy's Rall also testified that although La-Z-Boy published suggested retail prices, they did nothing to seek adherence to them (Tr. VII, 1084-85). And La-Z-Boy admitted a price war was good for its business (Tr. VIII, 1159). Schroeder's testimony was that La-Z-Boy had no policy when it came to policing dealer advertising—"nothing we could do about it" (Tr. VII, 1027). So when La-Z-Boy acted contrary to its usual policies, especially in the absence of any announced business reason to change its policies, that tends to exclude the possibility of independent action. Then the final act of putting World of Sleep out of the La-Z-Boy market had an adverse impact on La-Z-Boy's business in Denver; it succeeded only in helping Montgomery Ward regain its share of a reduced market. Montgomery Ward couldn't do that without La-Z-Boy's help. La-Z-Boy acting independently to cut its own throat is a non-sequitor.

Finally, getting Mauldin's promise was not an independent act. It is, without inference, concert of action.

II. Combining The Proofs Which Showed A La-Z-Boy/Mauldin Price Fixing Argument With The Montgomery Ward/La-Z-Boy Effort To Stop Price Competition Demonstrated A La-Z-Boy/Montgomery Ward/Mauldin Conspiracy To Engage In Price Fixing.

Because the Court of Appeals found sufficient evidence to submit to the jury the question of price fixing between La-Z-Boy and Mauldin on one hand, but insufficient evidence of conspiracy between La-Z-Boy and Montgomery Ward on the other hand, the approach that the Court

of Appeals took in analyzing the case was to fragment or to compartmentalize the evidence of conspiracy.

In *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 698-699 (1962), this Court stated:

> It is apparent from the foregoing that the Court of Appeals approached Continental's claims as if they were five completely separate and unrelated lawsuits. We think this was improper. In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. . . [T]he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole.

The failure to look at the case as a whole had its effect on both the lack of conspiracy finding as to Montgomery Ward and lack of Mauldin's participation in a conspiracy. The fact of the La-Z-Boy/Mauldin conspiracy (App. 16a) supports a similar conclusion regarding a Montgomery Ward initiated conspiracy—the price fixing agreement with Mauldin being one of the steps to achieve Montgomery Ward's and La-Z-Boy's announced goal of elimination of price competition. It was necessary to get all the parties engaged in the price war to stop, and getting one to agree to keep prices up was leverage to use on the other. Then the failure to get World of Sleep's compliance led to a more "drastic" measure, the interruption of supply.

As to Mauldin's participation in the La-Z-Boy/Mauldin agreement, seeking his role as an important pawn in the larger conspiracy would have supported a finding of "sufficient independent evidence" to allow the hearsay and thus defeat the motion for summary judgment (discussed in section III).

Furthermore, it appears the Court of Appeals did not appreciate the difference between the quantum and quality

of proof it had before it. Both direct evidence of a conspiracy existed as well as circumstantial evidence.

> When there is direct evidence of concert of action —a written agreement, or a memorandum of what transpired at a meeting, for example—the legal problem facing a court is different. Then it is not faced with the limitations of the inference-drawing process, for such direct evidence "tends to show the existence of a fact in question [concert of action], without the intervention of the proof of any other fact. . . ." Black's Law Dictionary 414 (5th ed. 1979). Rather, the court must simply determine whether, if the fact-finder were to credit the direct evidence of the fact in issue, the existence of that fact would have the legal significance urged by the proponent of the credited evidence. Would direct evidence of a horizontal agreement to fix resale prices in Japan, for example, have any legal significance in this action? Unlike most of the cases referred to in the preceding paragraph, this case presents a record in which there is both direct evidence of certain kinds of concert of action and circumstantial evidence having some tendency to suggest that other kinds of concert of action may have occurred. Thus none of those conscious parallelism cases can be dispositive on the propriety of summary judgment in this case. They deal not with the substantive question of what is a violation of section 1 of the Sherman Act, but with the adjective question of how such a violation may be proved circumstantially. Here, direct evidence and circumstantial evidence may validly be considered to cumulate and reinforce with respect to the ultimate facts in issue. For example, direct evidence of some kinds of concert of action like price fixing in Japan may be circumstantial evidence of a broader conspiracy.

In Re Japanese Electronic Products, 723 F.2d 238, 304-05 (3rd Cir. 1983).

The Court of Appeals should have looked to the direct evidence of an express agreement and determined that it

at least excluded the possibility that the manufacturer and one of the nonterminated dealers were acting independently. As to the other nonterminated dealer, Montgomery Ward did not want to compete on price with World of Sleep and it alone could not affect World of Sleep's supply, so it asked La-Z-Boy, "can't you tell the guy to stop". Pointing to the fact that Montgomery Ward set its own prices, as the Court of Appeals did, is not relevant to the inquiry of independent action in forming the conspiracy. Its relevance is limited to being a factor as to why the conspiracy came about: Montgomery Ward set its prices; it did not want to adjust them to meet World of Sleep's price competition.

Finally, was the termination pursuant to the agreement to maintain prices? Like in *Monsanto,* "[I]t would be reasonable to find that it was, since it is necessary for competing distributors contemplating compliance with suggested prices to know that those who do not comply will be terminated". 104 S. Ct. at 1472. And as in *Monsanto,* a link existed between the termination and the complaint. Following closely on the heels of the complaint was the statement by Rall, "Our plan is to leave you right there until we can figure out exactly what's gonna happen". When promptly presented with the opportunity to settle the account, La-Z-Boy did nothing and then took another three months to get it solved, and then only on very restrictive credit terms which did not permit World of Sleep to buy in volume.

The evidence, when looked at as a whole, establishes a resale price maintenance conspiracy between La-Z-Boy, Montgomery Ward and Mauldin.

III. Sufficient Independent Evidence Of Mauldin's Participation In The Conspiracy Existed To Withstand A Motion For Summary Judgment.

The Court of Appeals stated,

> The [trial] court ruled that the taped statements by Rall relating his conversation with Mauldin were hearsay as to Mauldin. The court found that these statements were not admissible against Mauldin under Fed. R. Evid. 801(d)(2)(E) because the survey results would not constitute sufficient independent evidence of a conspiracy involving Mauldin. We agree.

(App. 12a).

Fed. R. Evid. 801(d)(2)(E) provides:

> (d) Statements which are not hearsay. A statement is not hearsay if—
>
> * * *
>
> (2) Admission by party-opponent. The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

While Rule 801(d)(2)(E) must be examined to establish the admissibility of one conspirator's out of court statement about another conspirator, both the trial court and the Court of Appeals failed to properly analyze the statement in question: "I extracted a promise from Mr. Mauldin that he'd get his prices up and keep them up". That statement is admissible as an admission against interest by La-Z-Boy. Fed. R. Evid. 801(d)(2)(A). The statement is inadmissible against Mauldin until the co-conspirator rule is satisfied. But the statement can be used as admissible evidence of the conspiracy and who was party to it without questioning whether Fed. R. Evid. 104(a) would permit use of the statement because it was hearsay

in part. The trial court and Court of Appeals should not have limited their inquiry of Mauldin's participation to the survey results that showed Mauldin kept his prices up. That evidence should have been coupled with the direct proof of the express conspiracy.

Fed R. Evid. 104(a) provides:

> (a) *Questions of admissibility generally.* Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b) [relevancy]. In making its determination it is not bound by the rules of evidence except those with respect to privileges.

Notwithstanding the clear language of the Rule, the Tenth Circuit in *United States v. Peterson,* 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. denied,* 447 U.S. 905 (1980), adopted the procedure outlined by the Fifth Circuit in *United States v. James,* 590 F.2d 575 (1979). That procedure does not allow use of the hearsay statement as part of the preliminary ruling on admissibility. Circuit Judge Tjoflat, joined by Circuit Judge Ainsworth in a special concurring opinion, noted that the majority opinion could not be reconciled with Rule 104(a). He pointed to the Supreme Court view announced in *United States v. Matlock,* 415 U.S. 164, 175 (1974) that the then proposed Rule 104 was appropriate and "the judge should receive the evidence [hearsay] and give it such weight as his judgment and experience counsel". 590 F.2d at 592.

The other circuits which have agreed or disagreed with the opinion in *United States v. James* are collected in footnote 5.

The statement is a made-to-order example of why Evidence Rule 104(a) permits the trial court to consider hearsay in making the preliminary determination of admissibility. You have to try to use a piece of the puzzle to see if it fits before you know it fits.

At issue in this case is what additional proof was needed once a price fixing agreement is shown and the parties named in order to establish participiation by a conspirator. The fact that a participant did change his pricing after the promise is certainly more than a scintilla of evidence, not only of his own acts but of the likely existence of an agreement as well. Proof of an express agreement is not necessary, *Norfolk Monument Co., Inc. v. Woodland Memorial Gardens, Inc.*, 394 U.S. 700 (1969); *Glasser v. United States*, 315 U.S. 60, 80 (1942); and a

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[5] Circuits which allow hearsay are:

United States v. Drougas, 748 F.2d 8, 29 (1st Cir. 1984).
United States v. McCullah, 745 F.2d 350, 358 (6th Cir. 1984).

Those which do not allow hearsay are:

United States v. Jackson, 627 F.2d 1198, 1214-15 (C.A.D.C. 1980).
United States v. Terry, 702 F.2d 299, 320 (2nd Cir. 1983), *cert. denied*, 461 U.S. 931.
United States v. Gibbs, 739 F.2d 838, 843 (3rd Cir. 1984), *cert. denied*, 105 S. Ct. 779.
United States v. Talbert, 706 F.2d 464, 468 (4th Cir. 1983).
United States v. Marbury, 732 F.2d 390, 401 (5th Cir. 1984).
United States v. Regilio, 669 F.2d 1169, 1174 (7th Cir. 1981), *cert. denied*, 457 U.S. 1133.
United States v. Fahnbullek, 748 F.2d 473, 476 (8th Cir. 1984).
United States v. Miranda-Uriarte, 649 F.2d 1345, 1349 (9th Cir. 1981).
United States v. Monaco, 702 F.2d 860, 876-80 (11th Cir. 1983).

conspiracy can be implied from a course of dealing. *American Tobacco Co. v. United States,* 147 F.2d 93 (6th Cir. 1944), *aff'd,* 328 U.S. 781 (1946).

Additionally, Mauldin's position as a La-Z-Boy Showcase Shoppe indicated his susceptibility to coercion to make an agreement. (App. 19a). Accordingly, the statement of the agreement, the fact of keeping prices up, and the fact of La-Z-Boy's control over the Showcase Shoppes, all established that Mauldin was a participant to the conspiracy. Thus, the statement should have been admitted against him, which would have presented a question of fact for the jury and the summary judgment motion should have been denied.

IV. The Evidence Supported The Jury Verdict That A Robinson-Patman Violation Occurred And That World Of Sleep Was Injured By The Violation.

The Tenth Circuit Court of Appeals erred in reversing the jury verdict for World of Sleep on its Robinson-Patman claim. The Tenth Circuit concluded that World of Sleep had failed to show actual injury because it did not prove that its ability to compete with favored purchasers was impeded by its failure to receive the advertising allowance or had an adverse effect on its ability to price La-Z-Boy chairs. But the Tenth Circuit found that the evidence was sufficient to support the jury's conclusion that there had been a violation of the Robinson-Patman Act.

The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of greater purchasing power. *Blue Shield of Virginia v.*

McCready, 457 U.S. 465 (1982). World of Sleep may have been one of La-Z-Boy's largest independent dealers, but its purchases were a drop in the bucket compared to Montgomery Ward's purchases of $12,000,000 per year.

The evidence showed that World of Sleep prided itself on its ability to meet or beat the price of any competitor (Tr. III, 254). World of Sleep's ability to do business in large volumes with its manufacturer-suppliers enabled it to meet its internal pricing goals despite the hardship imposed by La-Z-Boy's discriminatory failure to make available an advertising allowance. These circumstances cannot fairly be interpreted to mean that World of Sleep suffered no antitrust injury as a result of La-Z-Boy's discrimination. In fact, the injury was exacerbated by the pivotal role of La-Z-Boy in World of Sleep's merchandising effort. Ted Koch, World of Sleep's Vice President, described World of Sleep's marketing method at Tr. IX, 1457, as follows:

> World of Sleep through advertising conveys to the customer quality, brand name, if available, value or price, selection, availability, anything that would make a customer want to come in and make their selection with World of Sleep.

Brand name merchandise was the major focus of World of Sleep's advertising, and Koch testified that La-Z-Boy gave World of Sleep a recognized brand name it could advertise in the newspapers in order to draw customers into its stores. World of Sleep had had dramatic success with La-Z-Boy (Tr. IX, 1457-59) but it still lost money during two of the years it carried La-Z-Boys (Ex. 112d, 112e). Its goodwill and advertising expenses to compete in the market for La-Z-Boy chairs and acquaint the con-

suming public with the fact that it carried La-Z-Boy at excellent prices resulted in its pricing La-Z-Boy chairs at an extremely marginal level in the highly competitive Denver market. Koch testified that if he had known an advertising allowance was available on the Americana line he would have purchased the Americana line for World of Sleep in order to offset some of World of Sleep's very substantial advertising expenses (Tr. X, 1466). Koch further testified that World of Sleep would have used advertising allowances had they been made available to it (Tr. X, 1469).

As a result of La-Z-Boy's violation of the Robinson-Patman Act, World of Sleep did not have the ability to elect whether it (1) would further lower its prices, to the ultimate benefit of the consumer, or (2) would choose to advertise more in an attempt to increase its overall business and profitability or (3) would increase its profitability on La-Z-Boy chairs specifically by offsetting some of the advertising costs to which it was already committed in order to carry out its marketing approach. The unavailability of all of these alternatives represents antitrust injury—injury of the kind the antitrust laws are designed to prevent. Unavailability of the first alternative adversely affected general consumer ability to obtain the best possible prices in the Denver market, and unavailability of the second two alternatives had an equally adverse affect on World of Sleep's business: its ability to compete profitably in the Denver market with the same advantages as its competitors.

Indeed, under the facts as presented to the jury, it may well have concluded that La-Z-Boy's termination of World of Sleep was itself the heart of the antitrust in-

jury resulting from La-Z-Boy's violation of the Robinson-Patman Act. Since the jury's verdict was for La-Z-Boy on World of Sleep's Sherman Act claim, the jurors may have believed La-Z-Boy's defense that it terminated World of Sleep for nonpayment of its bills and concluded that, had World of Sleep been receiving the advertising allowance to which it was entitled, it could have and would have timely paid its bills. Under either scenario, World of Sleep certainly proved the fact of damage as required by *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114, n. 9 (1969).

CONCLUSION

Because the misapplication of *Monsanto* to an evidentiary rule excluded certain of the evidence which tended to prove the factors of conspiracy required by *Monsanto*, and because the evidence of conspiracy was not considered as a whole, and admissible hearsay was excluded contrary to the Federal Rules of Evidence, the Supreme Court should review Sections III A and B of the opinion below as well as Section IV which overturned a jury verdict based on a narrow reading of the record.

Respectfully submitted,

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APPENDIX

COURT OF APPEALS OPINION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

WORLD OF SLEEP, INC.,
a Colorado corporation,

Plaintiff-Appellee,
Cross-Appellant

v.

LA-Z-BOY CHAIR COMPANY,
a Michigan corporation;

Defendant-Appellant,
Cross-Appellee

Nos. 82-1694
and 82-1818

MONTGOMERY WARD & CO.,
an Illinois Corporation;
ARTHUR MARK MAULDIN;
JEFF D. MAULDIN, individually
and d/b/a LA-Z-BOY SHOWCASE
SHOPPE; MAULDIN CORPORATION,
a New Mexico corporation;

Defendants-Appellees,

THOMAS E. HANSON,

Counterdefendant-Appellee.

Court of Appeals Opinion

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D. C. No. 79-C-1677)

Donald B. Gentry (Julia O. Robinson with him on the brief), of Grant, McHendrie, Haines & Crouse, P.C., Denver, Colorado, for Plaintiff-Appellee/Cross-Appellant.

Gregory L. Curtner (Larry J. Saylor of Miller, Canfield, Paddock and Stone, Detroit, Michigan; and James E. Hautzinger of Sherman & Howard, Denver, Colorado, with him on the briefs), of Miller, Canfield, Paddock and Stone, Detroit, Michigan, for Defendant - Appellant/Cross-Appellee, La-Z-Boy Chair Company.

Mark Crane (Glen H. Kanwit and Roxane C. Busey of Hopkins & Sutter, Chicago, Illinois; and John E. Walberg, Denver, Colorado, with him on the briefs), of Hopkins & Sutter, Chicago, Illinois, for Defendant-Appellee Montgomery Ward & Co.

David J. Richman and Susan M. Rogers of Coghill & Goodspeed, P.C., Denver, Colorado, on the briefs for Defendants-Appellees Arthur Mauldin and Mauldin Corporation.

Before SEYMOUR, McWILLIAMS, Circuit Judges and BROWN, District Judge*

SEYMOUR, Circuit Judge.

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*Honorable Wesley E. Brown, United States District Judge for the District of Kansas, sitting by designation.

Court of Appeals Opinion

In this antitrust action, plaintiff World of Sleep, Inc. alleged that defendants La-Z-Boy Chair Company, Montgomery Ward & Co., and Art Mauldin d/b/a La-Z-Boy Showcase Shoppe had conspired to maintain the retail price of La-Z-Boy chairs in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (1982). The district court granted summary judgment for Mauldin, finding no admissible evidence linking him to the alleged conspiracy. After a four week trial, the jury found in favor of the remaining defendants on this claim.

World of Sleep also alleged that La-Z-Boy had discriminated in its advertising allowances in violation of section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e) (1982). La-Z-Boy counterclaimed against World of Sleep, alleging that it had violated a provision of the Colorado Unfair Practices Act, Colo. Rev. Stat. § 6-2-105 (1973). The jury found in favor of World of Sleep on the Robinson-Patman claim and awarded damages of $40,000 against La-Z-Boy, which the trial court trebled pursuant to 15 U.S.C. 15(a) (1982). The jury found against La-Z-Boy on its counterclaim.

On appeal, World of Sleep contends that the trial court erred by refusing to submit the Sherman Act claim to the jury under the per se rule, and by granting summary judgment for Mauldin on that claim. World of Sleep further asserts that a new trial is required due to the prejudice resulting from the instructions taken as a whole, several evidentiary rulings, and the deliberate misconduct of opposing counsel. Montgomery Ward coun-

ters that the appeal is not timely, and that in any event the evidence is insufficient to establish a conspiracy involving it. La-Z-Boy also appeals, contending that it is entitled to a new trial on its state law counterclaim, that the court erred in submitting the Robinson-Patman claim to the jury, and that the award of attorney fees was excessive. We affirm in part and reverse in part.

I.

TIMELINESS OF THE APPEAL

As an initial matter we address Montgomery Ward's argument that the appeal in this case is not timely. World of Sleep's amended complaint asserted a request for attorneys fees along with claims for monetary and injunctive relief. The trial court entered judgment on the jury verdict on February 11, 1982, but did not address the outstanding request for attorneys fees. On March 17, 1982, the court ruled on the parties' post trial motions for new trial, and directed the parties to attempt to settle the attorneys fees claim and to brief any unsettled issues. On June 3, 1982, the court entered its order awarding attorneys fees of $64,708 against defendant La-Z-Boy. La-Z-Boy filed its notice of appeal on June 4, 1982, and World of Sleep filed on July 2, 1982. These notices of appeal were filed within thirty days of the order awarding attorneys fees but not within thirty days of the order denying the motions for new trial.

In *Gurule v. Wilson,* 635 F.2d 782, 788 (10th Cir. 1980), a civil rights action brought under 42 U.S.C. § 1983

(1982), this court held that a judgment on the merits is not a final order for purposes of appeal if it does not address a prior request for attorneys fees made pursuant to section 1988. In *Black Gold, Ltd. v. Rockwool Industries, Inc.*, 666 F.2d 1308, 1309 (10th Cir. 1981), we applied the *Gurule* rationale in an antitrust action and held that a decision on the merits which does not dispose of an outstanding request for attorneys fees is not final for purposes of appeal. Under these decisions, the notices of appeal were timely filed in the present case after the judgment on attorneys fees.

On March 2, 1982, however, shortly before the court denied the motions for new trial in the instant case, the Supreme Court ruled that a post-judgment application for attorneys fees is not a Rule 59(e) motion to alter or amend a judgment subject to the ten-day rule. *See White v. New Hampshire Department of Employment Security*, 455 U.S. 445, 451-52 (1982). "[A] request for attorney's fees under § 1988 raises legal issues collateral to the main cause of action—issues to which Rule 59(e) was never intended to apply." *Id.* at 451 (footnote omitted). Subsequently in *Cox v. Flood*, 683 F.2d 330 (10th Cir. 1982), which was rendered after the instant appeals were filed, we expressly overruled *Gurule* and *Black Gold* in light of *White*.

Montgomery Ward argues that *White* directly overruled *Gurule*, and that under the holding in *White* the March 17 ruling was a final order from which World of Sleep and La-Z-Boy failed to take timely appeals. We recently considered and rejected this argument in *EEOC*

v. Gaddis, 733 F.2d 1373, 1375-76 (10th Cir. 1984). We there held that *White* was a narrow opinion factually distinguishable from *Gurule*, and that *Gurule* was not overruled until we extended the rationale of *White* to it in *Cox*.

Montgomery Ward alternatively argues that *Cox* should be applied retroactively to preclude our review of the merits in this case. We considered a similar argument in *Gaddis*, 733 F.2d at 1376. Based on the analysis and authorities set out there, we decline to apply *Cox* retroactively to this case. The merits of the appeals are properly before us.

II.

BACKGROUND

The trial of this case consumed four weeks, and the record on appeal consists of over 3000 pages and hundreds of exhibits. Nonetheless, the pertinent background facts, although subject to some dispute, are not complicated.[1]

World of Sleep is a closely held corporation controlled and operated by Thomas Hansen. In 1965 it began the business of retailing bedding products in Denver. World of Sleep was a high-volume price discounter and advertised extensively. In April 1974, Hansen began ordering La-Z-Boy chairs for retail sale at World of Sleep. Montgomery Ward, La-Z-Boy's largest national purchaser

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[1]The evidence relevant to World of Sleep's claim under the Robinson-Patman Act and to La-Z-Boy's counterclaim under the Colorado Unfair Practices Act will be set forth separately in the sections addressing those claims.

of chairs for resale, also retailed La-Z-Boy chairs in Denver during the relevant time.

In the summer of 1975, World of Sleep ran a series of television commercials in which it mentioned its competitor Montgomery Ward by name, comparing the La-Z-Boy prices in Ward's catalogue with its own lower prices. Montgomery Ward complained to La-Z-Boy about the ads. Hansen testified that Gary Schroeder, executive vice president of sales and marketing for La-Z-Boy, told him to stop the ads. Schroeder did not remember talking to Hansen about the television ads although he did recall being told of Montgomery Ward's complaint by his right-hand man, Robert Rall.

In March 1976, the Mauldin Corporation, a family business, opened a La-Z-Boy Showcase Shoppe in Littleton, Colorado. A "Showcase Shoppe" is an independently owned retail store which sells only La-Z-Boy products and is licensed by La-Z-Boy to use the La-Z-Boy trade name. In late March, Hansen began running a series of newspaper ads undercutting both Mauldin's Showcase Shoppe and Montgomery Ward in the price of La-Z-Boy chairs, specifically referring in the ads to the Showcase Shoppe and Montgomery Wards by name. The ads continued until August.

In late April and early May 1976, La-Z-Boy notified World of Sleep of amounts past due on its account and requested a current financial statement. Hansen did not provide one. He testified that as a matter of policy he never released that information and that he had not provided it to La-Z-Boy when he began buying chairs. Al-

though Hansen did not deny that World of Sleep's account with La-Z-Boy was delinquent, he testified that it was due to a mix-up in deliveries by La-Z-Boy. On May 8, 1976, La-Z-Boy notified World of Sleep that its account was being placed on credit hold. The circumstances and motivation surrounding the imposition of the credit hold are the subject of conflicting evidence.

Hansen had telephone conversations with Robert Rall of La-Z-Boy on June 16 and June 23, 1976, concerning the newspaper ads in which Hansen compared World of Sleep's prices with those of Mongomery Ward. Hansen tape recorded those conversations and the tapes were admitted into evidence. In the June 16 tape, Rall said that Montgomery Ward had complained to him about the ads. Rall also told Hansen,

> "*we're all very concerned about pricing at any time —you know, and I knew, of course, I was going to hear from Montgomery Ward, but I extracted a promise from Mr. Mauldin that he'd get his prices up and keep them up,* which is illegal to even talk to him about, but I — I knew that if it carried on out there that we were all going to be in trouble, and him more than anybody else . . . because he has to rely upon La-Z-Boys to keep in business, but I'd kind of like to —I'd like to get it stopped. I don't want the same situation that we had in Phoenix, which was bad — I mean — you know — that was — there wasn't anything good about it. Schroeder was out there for four days trying to get it resolved, and seems pretty well to have everybody — you know — talking about making some money again. . . . I told him I was going to call Art first and then call you, and I just — you know — I'd like to know your feeling on it. *I'd like to know if — what it needs — what needs to be done,*

> *Tom, to stop a price war* — what you want from us or what you expect from us . . . — or what you want done there in the area."

Rec., pl. ex. 1 (emphasis added). Later in that same conversation Rall said,

> "[*w*]*e don't want any big price wars, and I'm going to do everything I can to get it stopped.* If it has to come down to being drastic about it with somebody, why, we will, but we—you know—we're kind of people that like to keep everything as smooth as possible and keep the waters calm. That's the way we all do business, but I don't want to see your business hurt, and I don't want to see La-Z-Boy's business hurt either."

Id. (emphasis added).

The June 23 conversation occurred following an alleged meeting between Rall and officers of Montgomery Ward. Rall indicated that Montgomery Ward was very unhappy about the ads and then stated to Hansen:

> "[W]e're very much concerned about [the Montgomery Ward situation] now, Tom. We don't really know at this moment exactly what we're going to do. I presume that you know that *we have your company on a credit hold now, and—you know—we can't ship you anything. Our plan is to leave you right there until we can figure out exactly what's going to happen,* and we're very sorry that any of this is happening."

Although the occurrence and circumstances of the alleged meeting between Rall and Montgomery Ward are matters of conflicting evidence, it is undisputed that the Denver furniture merchandiser for Montgomery Ward sent a World of Sleep ad to the national Montgomery Ward

chair buyer in Chicago, Al Weissenstein. Weissenstein testified that he complained about the ad to Rall, who "said he would talk to the guy [Hansen] to ask him to try to not run Ward's ads, reproduce Ward's ads, and . . . the guy said he wouldn't do it anymore." Rec., vol. XII, at 923.

Gordon Sauer, the La-Z-Boy Collection Manager during this time, testified that he intiated the decision to place World of Sleep on credit hold because of the large amounts past due. He asserted that he prepared a past due statement for World of Sleep which was given to Rall to take with him when he went to visit World of Sleep in late June 1976. World of Sleep officials testified, however, that Rall never discussed the delinquent amounts with them or attempted to reconcile the account. It was World of Sleep's position at trial that Rall had deliberately failed to get the credit situation resolved as part of the illegal conspiracy.

During the summer of 1976 World of Sleep paid up its account. Sauer testified that he considered the account ready for release from credit hold in September of that year. He further testified that under company policy, an account that had been on hold for three months or more was subject to a credit limit. Under the credit limit, World of Sleep was limited to the purchase of sixty chairs at a time. This restriction was later modified so that World of Sleep could order a carload of about 200 chairs at a time, but could not order another carload until the previous one had been paid for. World of Sleep had purchased over 4000 chairs in 1975. Hansen testified that under the restriction he was unable to obtain enough

chairs to pursue his high volume-heavy advertising sales method, particularly during the 1976 Christmas season. World of Sleep ultimately stopped buyng La-Z-Boy chairs in August 1977.

III.

THE PRICE FIXING CLAIM

Based on the above events, World of Sleep alleged that La-Z-Boy, Montgomery Ward, and Mauldin conspired to maintain the retail price of La-Z-Boy chairs in violation of the Sherman Act, and that the credit hold was imposed in an attempt to enforce this illegal agreement. After summary judgment was granted for Mauldin on this claim, the jury found in favor of Montgomery Ward and La-Z-Boy.

A. Summary Judgment for Mauldin

The district court granted Mauldin's motion for summary judgment, concluding that there was insufficient evidence admissible against Mauldin of his participation in the alleged conspiracy. In reviewing a grant of summary judgment we must view the evidence in the light most favorable to the opposing party and resolve all doubts in favor of the existence of triable issues of fact. *Mustang Fuel Corp. v. Youngstown Sheet & Tube Co.*, 516 F.2d 33, 36 (10th Cir. 1975). Although "summary procedures should be used sparingly in complex antitrust litigation," *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), they "have a place in the antitrust field, as elsewhere," *The White Motor Co. v. United*

States, 372 U.S. 253, 259 (1963); *see also First National Bank v. Cities Service Co.*, 391 U.S. 253, 289-90 (1968).

Following extensive discovery, the only evidence offered by World of Sleep connecting Mauldin to the alleged consipracy was the telephone conversation between Hansen and Rall on June 26, 1976, in which Rall stated that he had asked Mauldin to keep his prices up and that Mauldin had said he would do so. World of Sleep also represented to the court that it would present at trial the results of surveys showing that Mauldin's advertising became less price oriented after this phone call and that Mauldin and World of Sleep both sold the same chair models. The court ruled that the taped statements by Rall relating his conversation with Mauldin were hearsay as to Mauldin. The court found that these statements were not admissible against Mauldin under Fed. R. Evid. 801(d)(2)(E) because the survey results would not constitute sufficient independent evidence of a conspiracy involving Mauldin. We agree.

Under Fed. R. Civ. P.56(e), the court may consider only admissible evidence in ruling on a motion for summary judgment. "[A]cts and declarations of one coconspirator are admissible against another if the *existence* of a conspiracy is in fact first established by independent evidence." *United States v. Andrews*, 585 F.2d 961, 964 (10th Cir. 1978).

> "[U]nder Rule 104 of the Federal Rules of Evidence, [a trial judge] must determine, prior to admission of the hearsay statement, as a factual matter, that the [party seeking admission] has shown by independent evidence that it is more likely than not that (1) the

> conspiracy existed; (2) the declarant and the defendant against whom the consiprator's statement is offered were members of the conspiracy; and (3) the statement was made during the course of and in furtherance of the objects of the conspiracy."

United States v. Peterson, 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980). The independent evidence rule "is not limited to criminal cases, but applies to civil cases as well." *Filco v. Amana Refrigeration, Inc.*, 709 F.2d 1257, 1267 (9th Cir. 1983), *cert. dismissed*, 104 S.Ct. 385 (1983).

When the determination is made at the initial stage of the proceedings, as here, the conspiracy must be shown by substantial independent evidence. We have defined substantial independent evidence as more than a mere scintilla, and such evidence as a reasonable mind would accept as adequate to support a conclusion. *Peterson*, 611 F.2d at 1330 n.1.

Under this standard, we concur with the district court's determination that the proposed surveys did not constitute sufficient independent evidence to establish Mauldin's participation in a price fixing conspiracy, and that the hearsay statements therefore were not admissible against him. We accordingly affirm the summary judgment in favor of Mauldin.

B. Conspiracy Evidence With Respect To Montgomery Ward

Montgomery Ward contends that the trial court erred in denying its motion for directed verdict because the record contains insufficient admissible evidence of its partici-

pation in the alleged price fixing conspiracy. While this appeal was pending, the Supreme Court specifically addressed the quantum of conspiracy evidence required to raise a jury issue when a plaintiff dealer alleges that he was terminated by a manufacturer pursuant to a vertical agreement to maintain resale prices. *See Monsanto Co. v. Spray-Rite Service Corp.*, 104 S.Ct. 1464 (1984). Although the Court in *Monsanto* was concerned with conspiracy evidence sufficient to avoid a directed verdict for a defendant manufacturer, rather than a defendant dealer-competitor such as Montgomery Ward, the analysis in *Monsanto* governs our resolution of Montgomery Ward's argument. The issue before us requires that we integrate the standards of *Monsanto* with the rule, discussed above in Part III A, that a co-conspirator's hearsay statements are inadmissible against a defendant absent independent evidence of a conspiracy involving that defendant.

In *Monsanto* the Court held that a jury may not be permitted to infer an agreement "merely from the existence of complaints, or even from the fact that termination came about 'in response to' complaints," *id.* at 1470, because this evidence, without more, does not indicate concerted action. The Court noted that although evidence of complaints does have some probative value, "the burden remains on the anti-trust plaintiff to introduce addtional evidence sufficient to support a finding of an unlawful contract, combination, or conspiracy," *id.* at 1471 n.8, and "that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently." *Id.* at 1471. "[E]vidence must be presented both that the distributor communicated its acquiescence

or agreement, and that this was sought by the manufacturer." *Id.* at n.9.

Here the district judge held extensive pretrial hearings to determine whether the taped telephone conversations were admissible against Montgomery Ward, and concluded that sufficient independent evidence existed of a conspiracy between La-Z-Boy and Montgomery Ward to admit the tapes under Fed. R. Evid. 801(d)(2)(E). With the benefit of *Monsanto*, we must disagree. If Montgomery Ward independently set its own prices, and if La-Z-Boy unilaterally decided to terminate World of Sleep for refusing to keep its prices up, no conspiracy existed between Montgomery Ward and La-Z-Boy. The only independent evidence of a conspiracy between them is precisely that which was held to be insufficient to raise a conspiracy fact issue in *Monsanto*—complaints by a dealer who competes with the price cutting plaintiff, and action in response by the manufacturer adverse to the price cutter. Under *Monsanto* this evidence does not tend to exclude the possibility that La-Z-Boy and Montgomery Ward were acting independently. World of Sleep presented no other evidence that La-Z-Boy sought and received Montgomery Ward's agreement to maintain resale prices, or that Montgomery Ward sought and received La-Z-Boy's agreement to coerce other dealers to keep their prices up.

We conclude that the record contains insufficient independent evidence of Montgomery Ward's participation in the alleged conspiracy to permit the admission of co-conspirator's hearsay statements, *see Filco*, 709 F.2d at 1267, and that the independent evidence, standing alone, was not enough to allow this issue to go to the jury. For

this reason, we affirm the judgment for Montgomery Ward on the Sherman Act claim.

C. Conspiracy Evidence Against La-Z-Boy

We reach a different conclusion with respect to La-Z-Boy. A buyer who contends that a seller has taken action adverse to him as a means of enforcing price fixing may establish the requisite conspiracy by showing that although he refused to acquiesce in the price fixing, other buyers agreed to the arrangement. *See Black Gold Ltd. v. Rockwool Industries, Inc.*, 729 F.2d 676, 685-86 (10th Cir.), *cert. denied*, 105 S.Ct. 178 (1984); *see also Black Gold Ltd. v. Rockwool Industries, Inc.*, 732 F.2d 779 (10th Cir. 1984) (opinion on rehearing). The evidence shows that Montgomery Ward complained to La-Z-Boy about World of Sleep's ads, and that La-Z-Boy thereafter tried to convince World of Sleep to stop its price war. The taped telephone conversations are evidence that La-Z-Boy, through its agent Robert Rall, sought and received Mauldin's agreement to keep his prices up.[2] The tapes and other evidence support a reasonable inference that Rall attempted to coerce World of Sleep's president, Hansen,

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[2]Although the tapes are inadmissible as to Mauldin under the co-conspirator's hearsay rule, we agree with the district court that the tapes are admissible against La-Z-Boy under Fed. R. Evid. 801(d)(2)(1) as an admission by a party. The conclusion that the tapes were inadmissible as to Mauldin was not a conclusion that Mauldin and La-Z-Boy had not conspired, and the trial judge so stated. In an action against La-Z-Boy, therefore, La-Z-Boy can still be accused of conspiring with Mauldin. *See, e.g., United States v. Sangmeister*, 685 F.2d 1124, 1126-27 (9th Cir. 1982); *United States v. Coppola*, 526 F.2d 764, 776 (10th Cir. 1975); *cf. United States v. Hopkinson*, 631 F.2d 665, 668 (10th Cir. 1980), *cert. denied*, 450 U.S. 969 (1981).

into agreeing to keep his prices up by using the credit hold and subsequent purchase restrictions as "a lever to force compliance." *Monsanto*, 104 S.Ct. at 1471 n.10. This evidence raises a fact issue as to whether a conspiracy existed involving La-Z-Boy and Mauldin, and is sufficient to send the Sherman Act claim against La-Z-Boy to the jury. *See id.* at 1471-72.

D. The Requested Per Se Instruction

The district court instructed the jury to evaluate World of Sleep's Sherman Act claim under the rule of reason. Given our conclusion that the record contains sufficient admissible evidence of a conspiracy involving La-Z-Boy to create a jury issue, we must determine whether the trial court erred in holding that the Sherman Act claim was not subject to the per se rule.

The factual, legal, and economic considerations relevant to an alleged vertical conspiracy to maintain resale prices are troublesome and have been the subject of considerable litigation and commentary. In *Continental T.V., Inc. v. GTE Sylvania*, 433 U.S. 36, 58 (1977), the Supreme Court overruled *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), and held that nonprice vertical restraints are not illegal per se but are to be judged under the rule of reason. Both before and after the *Sylvania* decision arguments have been offered in favor of abandoning the per se rule with respect to vertical price restraints as well. *See, e.g., Sylvania*, 433 U.S. at 69-70 (White, J., concurring in the judgment); *Monsanto*, 104 S.Ct. at 1469 n.7; A.B.A. Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intraband Competi-

tion 77-96 (1977). However, in *Monsanto* the Court declined to alter the rule that vertical agreements to fix prices remain illegal per se. *See* 104 S.Ct. at 1469; *see also Sylvania,* 433 U.S. at 51 n.18.

La-Z-Boy argued to the trial court that there can be no per se illegal price fixing in a vertical context without an announced fixed resale price and adherence to that announced price. La-Z-Boy convinced the court that to be subject to the per se rule, the vertical agreement must be to maintain a specific price rather than merely to keep prices up. La-Z-Boy argues on appeal that coercion to maintain price levels, which would be illegal per se in a horizontal agreement, is not per se illegal when the conspiracy is vertical. We are not persuaded.

The Supreme Court has proscribed vertical price fixing conspiracies as illegal per se because such agreements deprive dealers of the ability to exercise their own judgment in "making independent pricing decisions." *Monsanto,* 104 S.Ct. at 1470; *Albrecht v. Herald Co.,* 390 U.S. 145, 152-53 (1968); *see also Simpson v. Union Oil Co.,* 377 U.S. 13, 20-21 (1964); *cf, United States v. Parke, Davis & Co.,* 362 U.S. 29, 45-47 (1960). In condemning vertical price restraints, the Court has often cited the descriptions of price fixing set out in *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 223 (1940), a case involving a horizontal price fixing conspiracy. *See e.g., Simpson,* 377 U.S. at 18; *Parke, Davis,* 362 U.S. at 47; *see also Albrecht,* 390 U.S. at 151. *Socony-Vacuum* states that "[u]nder the Sherman Act a combination formed for the purpose and with the *effect of raising,* depressing, fixing, pegging, or *stabilizing* the price of a commodity in interstate or for-

eign commerce is illegal per se." *Socony-Vacuum*, 310 U.S. at 223 (emphasis added).

Given the Supreme Court's adoption in vertical cases of a price fixing definition requiring only that prices be raised or stabilized, we reject La-Z-Boy's argument that a vertical conspiracy which maintains resale prices without setting a fixed price is not illegal per se.[3] The relevant consideration is not whether a specific price is set, but whether a dealer's independent judgment is eliminated through a coerced agreement. *See id.* at 221-22; *AAA Liquors, Inc. v. Joseph E. Seagram & Sons Inc.*, 705 F.2d 1203, 1205-06 (10th Cir. 1982), *cert. denied*, 461 U.S. 919 (1983). In this case, World of Sleep contends that La-Z-Boy successfully pressured Mauldin to agree to keep his prices above the level he would have set in response to World of Sleep's competition. There is evidence in the record that La-Z-Boy was in a position to exert pressure over Mauldin, who carried only La-Z-Boy products. We conclude that the jury should have been instructed that such an agreement, if proven, is illegal per se. Accordingly, we reverse and remand for a new trial on World of Sleep's Sherman Act claim against La-Z-Boy.

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[3]We have examined the authorities cited by La-Z-Boy to support its theory and find that they are factually distinguishable. These cases do not even address the distinction which La-Z-Boy contends is dispositive here. They are concerned instead with *nonprice* restraints, *see, e.g., Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 295 (5th Cir. 1981); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 638 F.2d 15, 16 (4th Cir.), *cert. denied*, 454 U.S. 864 (1981), or the evidence necessary to establish a coerced agreement, *see, e.g., H. L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 945 (2d Cir. 1981), *cert. denied* 459 U.S. 880 (1982); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110-16 (3d Cir. 1980), *cert. denied* 451 U.S. 911 (1981).

E. Lost Profits from Licensee Sales

In 1977, after the events giving rise to this lawsuit, World of Sleep entered into licensing arrangements with four stores in the Denver area. Two of the stores were controlled by World of Sleep officers, and two were independently owned although apparently closely connected to World of Sleep. World of Sleep sold merchandise to these stores at a profit, and provided them warehouse facilities and advertising. At trial, World of Sleep sought to recover as damages the lost profits it would have realized on sales of La-Z-Boy chairs to its licensee stores had it still been dealing with La-Z-Boy. The district court refused to allow these lost profits as an element of damages, ruling under Fed. R. Evid. 403 that they would cause undue confusion and delay, and that they were too speculative.

Damages are awarded to an antitrust plaintiff under Section 4 of the Clayton Act, which provides in pertinent part:

> "[Any] person who shall be injured in his business or property by reason of anything forbidden in the anti-trust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

15 U.S.C. § 15(a). Under this Act, a plaintiff seeking to recover lost profits that he would have made if he had not been prevented from doing so by the defendant's illegal conduct must prove an antitrust violation, the fact of damage or injury, and measurable damages. *Danny Kresky Enterprises Corp. v. Magid,* 716 F.2d 206 209 (3d Cir.

1983). To establish the fact of injury a plaintiff must show "a causal connection between the defendant's actions violative of the Sherman Act and the actual injury to the plaintiff's business." *King & King Enterprises v. Champlin Petroleum Co.*, 657 F.2d 1147, 1156 (10th Cir. 1981), *cert. denied*, 454 U.S. 1164 (1982).

The Supreme Court has directed us to

> "observe the practical limits of the burden of proof which may be demanded of a treble-damage plaintiff who seeks recovery for injuries from a partial or total exclusion from a market; damage issues in these cases are rarely susceptible of the kind of concrete, detailed proof of injury which is available in other contexts. The Court has repeatedly held that in the absence of more precise proof, the factfinder may 'conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes, that defendants' wrongful acts had caused damage to the plaintiffs.'"

Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969) (citations omitted) (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946.) Thus, a plaintiff's burden to show injury in fact "is satisfied by its proof of *some* damage flowing from the unlawful conspiracy," *id.* at 114 n. 9, which may be established by reasonable inferences drawn from circumstantial evidence, *id.* at 125.

If the plaintiff has demonstrated some damage, the actual amount need not be proven to the same degree of certainty. *King & King*, 657 F.2d at 1158. "[A] plaintiff

is not to be held to a rigid standard of proof regarding the amount of damages, since in such cases economic harm is frequently intangible and difficult to quantify." *Id.* at 1157.

> "[W]hile the damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate. The wrongdoer is not entitled to complain that they cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise."

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

The trial judge in this case concluded that World of Sleep's lost profits from potential sales to the licensee stores were to speculate because "there is no history at all of any profit or loss on these dealings during the years involved in this case . . . [and] no evidence that La-Z-Boy would have consented to such an operation." Rec., vol. XII, at 787. The court also concluded that World of Sleep had failed to supply sufficient evidence of the expenses involved in this business to show that any profit would have been realized.

Under the standards for proof of antitrust damages set out above, we must conclude that the court's decision to exclude proof of this element of damages cannot be sustained. If proof of a profit and loss history were required, no plaintiff could ever recover for losses resulting from his inability to enter a market. However, such recoveries are clearly available under section 4 of the Clayton Act.

See, e.g. Zenith 395 U.S. at 129. Here, plaintiff proffered evidence that all four Denver licensee stores bought almost all their merchandise from World of Sleep, and that World of Sleep sold La-Z-Boy chairs to other licensee stores outside the Denver area during the existence of the alleged conspiracy.[4] World of Sleep also proffered evidence through its expert of the method by which the potential profits could be calculated. Other evidence at trial tended to prove the unique character of La-Z-Boy chairs and World of Sleep's inability to replace that brand with another equally effective seller. World of Sleep also demonstrated the value of selling a recognized name brand. This evidence is sufficient to permit a reasonable inference of injury in fact, and to afford a rational basis for inferring an approximate amount of damages. On retrial of the Sherman Act claim against La-Z-Boy, World of Sleep may thus present evidence relevant to this element of damages.[5]

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[4]We thus disagree with the district court's conclusion that World of Sleep failed to make an adequate showing that La-Z-Boy would have consented to the potential sales at issue here. We note that there is one reference in the record to La-Z-Boy's potential disapproval of transshipping, but only with respect to shipments made to dealers outside the Denver area. Any factual dispute on this issue is one for the jury to resolve.

[5]In view of our resolution of this issue, we conclude that, on retrial, Fed. R. Evid. 403 would not bar admission of noncumulative evidence of this proper element of damages. We also note that the issues on retrial have been reduced considerably by our resolution of the arguments raised on appeal.

IV.

THE ROBINSON-PATMAN CLAIM

La-Z-Boy originally manufactured one line of chairs, the Charter line, which was purchased primarily by furniture stores. Prior to the events at issue here, La-Z-Boy created a second line, the Americana line, which was developed for sale to department stores. The evidence at trial tended to prove that the differences between the two lines, if any, were at most cosmetic. Because department stores allegedly preferred to do their own advertising, La-Z-Boy established a promotional allowance which it offered on each Americana chair. The allowance ranged over time from $2.25 to $3.00 per chair. La-Z-Boy offered only advertising aids to the furniture stores retailing the Charter line. World of Sleep carried the Charter line and did not obtain an advertising allowance on most of the chairs it purchased. Montgomery Ward carried the Americana line and did receive the allowance.

World of Sleep claimed that La-Z-Boy violated section 2(e)[6] of the Robinson-Patman Act, 15 U.S.C. § 13(e),

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[6]We note that World of Sleep's claim should properly have been asserted under section 2(d) rather than 2(e). World of Sleep claims that La-Z-Boy illegally gave an allowance to Montgomery Ward. "Section 2(d) applies when the *seller pays the buyer,* or grants him a price allowance, for promotional services to be rendered by the buyer; Section 2(e), on the other hand, applies when a *seller performs* the promotional service for the buyer." 5 J. von Kalinowski, Antitrust Laws and Trade Regulation § 34.01[2], at 34-10 to -11 (1984) (footnotes omitted). This error does not affect our analysis because these two sections have been interpreted almost identically. *Id.* 34.02.

by failing to provide it the same allowance offered to Montgomery Ward. The jury returned a verdict for World of Sleep on the claim and awarded damages of $40,000. La-Z-Boy argues on appeal that this claim should not have gone to the jury because World of Sleep offered no evidence that it suffered actual injury as required to recover damages under section 4 of the Clayton Act, 15 U.S.C. § 15.

To recover damages for a Robinson-Patman violation under section 4 of the Clayton Act, "a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent." *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 562 (1981). As we discuss above in Part III E, a plaintiff must show that he suffered actual antitrust injury as a result of the violation—he must prove injury in fact.

In *J. Truett Payne* the Supreme Court rejected the "automatic damages" rule with respect to section 2(a) violations,[7] and concluded that the requisite injury and damages cannot be presumed from a showing of illegal discrimination alone. 451 U.S. at 563. That holding is equally applicable to a plaintiff seeking damages for a violation of section 2(e) because such damages are also governed by section 4 of the Clayton Act, the damages provision construed in *J. Truett Payne*. Under the Supreme Court's analysis, a plaintiff must show more than that he failed to receive a promotion allowance. He must

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[7]Section 2(a) of the Robinson-Patman Act provides in pertinent part it "shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . ." 15 U.S.C. § 13(a).

show that this disadvantage adversely affected his ability to compete with favored competitors, because this is the competitive injury the Robinson-Patman Act was intended to prevent. *See id.* at 563-64 & n.4. Such a showing may be made by proof that the illegal discrimination permitted a favored purchaser to lower its prices and thereby reduce a plaintiff's sales or profits. *Id.* at n.4. A disfavored buyer might also show that as a result of paying more for its goods than its competitors, it was less able to "advertise, make capital expenditures, and the like." *Id.*

The record in this case contains no evidence that World of Sleep's ability to compete with favored purchasers of La-Z-Boy chairs was in any way impeded by its failure to receive the advertising allowance. A World of Sleep official, Ted Koch testified that his company had a "dramatic success story" with La-Z-Boy chairs, rec., Vol. XV, at 1459, and had "a very pleasurable experience with the La-Z-Boy line by having a dramatic surge in sales of a product that we heretofore had not carried." *Id.* at 1460. Indeed, the record indicates that World of Sleep became the second largest independent retailer of La-Z-Boy chairs in the country and came close to being the largest. Koch also agreed that World of Sleep's advertising was effective to draw customers. Hansen himself testified that World of Sleep's "advertising on La-Z-Boy was quite successful. We were advertising a lot and it was doing a good job for us." Rec., vol. XXII, at 2907. World of Sleep presented no evidence that the allowance enabled favored competitors to lower their prices and divert sales, or that it had to lower its prices to an unprofitable level in response to such low prices. There is no evidence that the higher price World of Sleep paid for

La-Z-Boy chairs had any other adverse impact on its activity in the marketplace. Indeed, World of Sleep's position at trial was that, under its method of retailing, its ability to obtain a sufficient *volume* of merchandise was the critical factor in its competitive position.

Although World of Sleep presented evidence that it paid more for La-Z-Boy chairs than did competitors who received the advertising allowance, this showing is not enough to establish injury in fact under the analysis in *J. Truett Payne*. In view of the complete absence of record evidence that the alleged Robinson-Patman discrimination had any detrimental effect on World of Sleep's ability to do business, its damage claim for this violation should not have gone to the jury. We therefore must reverse the award of damages under the Robinson-Patman Act.

V.

THE STATE LAW CLAIM

La-Z-Boy counterclaimed for damages against World of Sleep under the Colorado Unfair Practices Act, alleging that World of Sleep unlawfully sold La-Z-Boy chairs below cost. The jury found in favor of World of Sleep. On appeal, La-Z-Boy contends that it should have been granted a new trial on this claim beacuse the verdict was against the weight of the evidence. We disagree.

Colorado law prohibits a vendor from selling below cost, as defined by statute, unless such a sale is made in good faith to meet competition. Colo. Rev. Stat. §§ 6-2-105, 6-2-110 (1973). A person injured by an illegal sale below

cost may recover three times the amount of actual damages sustained. *Id.* § 6-2-111.

Denial of a motion for new trial alleging insufficient evidence will not be reversed unless the moving party has "demonstrated that the verdict was clearly or overwhelmingly against the weight of the evidence." *Prebble v. Brodrick,* 535 F.2d 605, 617 (10th Cir. 1976). In this case, World of Sleep presented evidence at trial adequate to support the jury verdict in its favor.

VI.

CONCLUSION

We need not consider in detail the remaining allegations of error. In view of our disposition of the Robinson-Patman claim, the award of attorneys fees to World of Sleep for the Robinson-Patman violation must be reversed. If an award of fees is appropriate after retrial, it should be made under the guidelines set out in *Ramos v. Lamm,* 713 F.2d 546 (10th Cir. 1983).[9] We share the district judge's dismay over the failure of La-Z-Boy's counsel to abide by the court's rulings during trial; however, we need not determine whether such conduct was prejudicial and we presume it will not recur. We have examined World of Sleep's argument with respect to the jury instructions and conclude that, except for the court's failure to give a per se instruction as discussed in Part III C above,

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[9]Although *Ramos* addresses an award of fees under 42 U.S.C. § 1988 (1982), the same standards govern an award of fees under the federal antitrust laws. *See Hensley v. Eckerhart,* 461 U.S. 424, 430 n.4 (1983).

World of Sleep's allegations of reversible error are without merit.

Accordingly, we affirm the judgment for Mauldin and Montgomery Ward on the Sherman Act claim. We reverse the judgment for La-Z-Boy on this claim and remand for a new trial in light of this opinion. We reverse the judgment and award of damages and attorney fees in favor of World of Sleep on the Robinson-Patman claim. Finally, we affirm the judgment in favor of World of Sleep on the claim under the Colorado Unfair Practices Act.

Affirmed in part, reversed in part, and remanded for further proceedings.

STATUTES

Sherman Act, Section 1

SHERMAN ACT, SECTION 1

15 U.S.C. § 1

§ 1. Trusts, etc., in restaint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

ROBINSON PATMAN, SECTION 2

15 U.S.C. § 13

Payment for services or facilities for processing or sale

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

Furnishing services or facilities for processing, handling, etc.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

CLAYTON ACT, SECTION 4
15 U.S.C. § 15

§ 15. Suits by persons injured

(a) Amount of recovery; prejudgment interest

Except as provided in subsection (b) of this section, any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

RULES OF EVIDENCE

Rule 104.

PRELIMINARY QUESTIONS

(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.

(b) Relevancy conditioned on fact. When the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.

Fed. R. Evid.

Rule 801.

DEFINITIONS

The following definitions apply under this article:

(d) Statements which are not hearsay. A statement is not hearsay if—

(2) Admission by party-opponent. The statement is offered against a party and is (A) his own statement, in either his individual or a representative capacity or (B) a statement of which he has manifested his adoption or belief in its truth, or (C) a statement by a person authorized by him to make a statement concerning the subject, or (D) a statement by his agent or servant concerning a matter within the scope of his agency or employment, made during the existence of the relationship, or (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

DENIAL OF PETITION FOR REHEARING

MARCH TERM—April 9, 1985

Before Honorable William J. Holloway, Jr., Honorable Robert H. McWilliams, Honorable James E. Barrett, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Circuit Judges, and Honorable Wesley E. Brown*

Nos. 82-1694 and 82-1818

WORLD OF SLEEP, INC., A Colorado Corporation,

Plaintiff-Appellee,
Cross-Appellant,

v.

LA-Z-BOY CHAIR COMPANY, a Michigan Corporation,

Defendant-Appellant,
Cross-Appellee,

MONTGOMERY WARD & CO., etc., et al.,
Defendants-Appellees,

THOMAS E. HANSON,
Counterdefendant-Appellee.

This matter comes on for consideration of the petition for rehearing, with suggestion for rehearing in banc, filed in the captioned cause by World of Sleep, plaintiff-appellee and cross-appellant.

Upon consideration whereof, the petition for rehearing is denied by the panel to whom the case was argued and submitted.

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*District Court Judge of the United States District Court for the District of Kansas, sitting by designation.

The petition for rehearing having been denied by the panel to whom the case was argued and submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing in banc, Rule 35, Federal Rules of Appellate Procedure, the suggestion for rehearing in banc is denied.

/s/ Howard K. Phillips, Clerk

JUDGMENT

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 79-C-1677

WORLD OF SLEEP, INC., a Colorado corporation,

Plaintiff,

v.

LA-Z-BOY CHAIR COMPANY; MONTGOMERY WARD & CO., INCORPORATED; ARTHUR MARK MAULDIN; JEFF D. MAULDIN, individually and doing business as LA-Z-BOY SHOWCASE SHOPPE, and MAULDIN CORPORATION,

Defendants.

JUDGMENT

(Filed February 11, 1982)

This action having come on for trial before a jury of six, Honorable Jim R. Carrigan presiding, and the issues having been duly tried and the jury having duly rendered its verdict,

IT IS ORDERED AND ADJUDGED:

1. On the plaintiff's First Claim for relief under the Sherman Act:

That the plaintiff take nothing and that judgment be entered in favor of the defendants La-Z-Boy Chair Company and Montgomery Ward & Co., Inc.;

2. On the plaintiff's Second Claim for relief under the Robinson-Patman Act:

The jury having returned its verdict in the sum of $40,000 which is to be trebled pursuant to 15 U.S.C. § 15,

that the plaintiff recover from the defendant La-Z-Boy Chair Company the sum of $120,000, plus interest at the legal rate from February 8, 1982;

3. On the defendant La-Z-Boy Chair Company's Counterclaim:

That La-Z-Boy Chair Company take nothing and that judgment be entered in favor of World of Sleep, Inc. and Thomas E. Hansen;

4. On the plaintiff's claims against Arthur Mauldin and Mauldin Corporation which were previously dismissed by Order dated January 5, 1982;

That the plaintiff take nothing and that judgment be entered in favor of Arthur Mauldin and Mauldin Corporation, costs as awarded in the previous order;

5. Montgomery Ward & Co., Inc. shall have its costs of action to be taxed against the plaintiff upon the filing of a bill of costs within 10 days after entry of this judgment;

6. The plaintiff shall have its costs of action to be taxed against La-Z-Boy Chair Company upon the filing of a bill of costs within 10 days after entry of this judgment.

DATED at Denver, Colorado, this 11th day of February, 1982, nunc pro tunc to February 8, 1982.

BY THE COURT:

/s/ Jim R. Carrigan, Judge
United States District Court

EXHIBIT 2 (TR. III p. 342)

(p. 342) "VOICE: Pick up local ten.

VOICE: Hello?

MR. HANSEN: It's what—June 16, 1976, and I'm going to call Bob Rall and—I just want to see how this thing is working.

VOICE: Okay.

MR. HANSEN: Okay.

Hello, Bob.

MR. RALL: You got me in a lot of trouble.

MR. HANSEN: How did I get you in a lot of trouble?

MR. RALL: I got at least forty-seven people bearing me on the head and alongside of the head and one of them is kicking me in the ass and that's Montgomery Ward. The other ones—the other ones are all just mean people.

MR. HANSEN: Just mean people. What have I done?

MR. RALL: Well, you ran a little ad the other day—'World of Sleep declares price war on La-Z-Boy—'

MR. HANSEN: Yeah?

MR. RALL: Eighty forty-nine and one seventeen and all those various prices that you ran.

MR. HANSEN: Yeah?

MR. RALL: I called Art Mauldin because I—Bob Reau called me and I called Art and I said, 'I told you if you screwed around with Tom Hansen he was going to

kill you,' and I said, 'Obviously, you got Tom mad.' I was referring primarily to that hi-fi that he ran, and I know he slipped an eight forty-nine in (p. 343) there at a hundred and thirty-seven bucks, and also some chairs starting at $99.

MR. HANSEN: Who's Mauldin?

MR. RALL: Mauldin is the La-Z-Boy Showcase Shoppe owner—Art Mauldin. You didn't know that?

MR. HANSEN: Humm-mm.

MR. RALL: Oh, okay.

MR. HANSEN: Now I do.

MR. RALL: Art Mauldin—M-a-u-l-d-i-n is his name, and his son, Jeff Mauldin, runs the store down in Albuquerque.

MR. HANSEN: Uh-huh.

MR. RALL: Art was on the road for many years for Hammery tables and also a lamp line—

MR. HANSEN: Uh-huh.

MR. RALL: —before he got involved in La-Z-Boy Showcase Shoppes, but I called him primarily to tell him that—you know—I was—I'm more concerned about him that (sic) I am about you, but we're all very concerned about pricing at any time—you know—and I knew, of course, I was going to hear from Montgomery Ward, but I extracted a promise from Mr. Mauldin that he'd get his prices up and keep them up, which is illegal to even talk to him about, but I—I knew that if it carried on out there that we were all going to be in trouble, and him more than anybody else—

MR. HANSEN: Uh-huh.

MR. RALL: —because he has to rely upon La-Z-Boys to keep (p. 334) in business, but I'd kind of like to—I'd like to get it stopped. I don't want the same situation that we had in Phoenix, which was bad—I mean—you know—that was—there wasn't anything good about it. Schroeder was out there for four days trying to get it resolved, and seems pretty well to have everybody—you know—talking about making some money again, and then he was—where was he?—he was in Los Angeles, and Bob Reau called me and I called him about this ad, and he about shit, so—but at any rate, I told him I was going to call Art first and then call you, and I just—you know—I'd like to know your feeling on it. I'd like to know if—what it needs—what needs to be done, Tom, to stop a price war—what you want from us or what you expect from [illegible]

MR. HANSEN: Well—

MR. RALL: —or what you want done there in the area.

MR. HANSEN: Really, I have no control over the area. Number one, when this store came in—and I had talked to Gary about this, and he said he was going to come out in a few weeks or whatever—

MR. RALL: He's planning to come out the last week of the month.

MR. HANSEN: Uh-huh. But my feelings were totally bad, not from the standpoint of this La-Z-Boy shop coming in to Denver—I mean anyone that buys a stack of chips can play in the game as far as I'm concerned. My real concern was that somehow or another he had a pretty

good insight into our (p. 345) programming of chairs, and the only thing that he had in stock was our basic programs, and everything else is special order, and he apparently came in and shopped our stores after that and cut all our prices by a dollar and ninety-five cents, and I wouldn't even been concerned there, except that in shopping the store thoroughly, he had to have some sort of insight into what chairs we stocked and what our program was, because he had those in stock to deliver, and when he was questioned about all other chairs, it was special order, so that either Reau—

MR. RALL: Is that right, Tom? I didn't—I didn't realize—

MR. HANSEN: Yes, yes. I mean, just totally our program was in the same covers and so forth there on the floor, and I don't know whether Reau did that, or who did that—

MR. RALL: Oh—

MR. HANSEN: —but I mean, I know he had no way—you know—by setting that store up, to know what the hell we were doing or what we had on order even at the time, and that concerned me greatly, and from the standpoint of being cute and going to cut our prices $1.95, I run a series of ads for the next ten days—last week they cut our price $1.95, this week we cut their price $30.

MR. RALL: I've got them all right here. I know what you're talking about.

MR. HANSEN: And at that particular point—I run my own business, and—I mean, if someone is going to come in and try (p. 346) and take over my business, I'm

going to fight them. I mean, it's just pure and simple, and I don't know where it will end up or how it will end up, and like I say, my greatest concern is this program of whatever stock he's got is pointed at me, and if he had his own program and so forth and wasn't pointing at me—so what the hell, how much business you going to do?—and I've got a big investment in La-Z-Boy. I carried a big inventory. I told people back at the factory, 'I don't know how in the hell you people, when you can't deliver solid carloads of one chair, how you can deliver 250 chairs from all different plants and so forth,' and that like I say, my major concern was the insight that he had into our business, and I personally feel that it come from Bob Reau or someone at La-Z-Boy because—I mean, some of the chairs, if this store was planned for any length of time, weren't even on his—weren't even on our floor to check out at times, and with him opening with that shop, and think he's going to come in here and undercut our prices minimally, I'm not going to stand for it.

MR. RALL: Well, I don't blame you for that. Tom, I'm—that's a surprise to me. I have not been in his store, nor has Gary, and—did you tell Gary that on the phone?—that he has the—

MR. HANSEN: Yes.

MR. RALL: —the same—because I had a long talk with Gary this morning, and he didn't bring that up, so he obviously had forgotten that, and that, of course, not only surprises me, but (p. 347) that would certainly be unfair if he's just got your chairs and he's special ordering other

chairs, then it would be very wrong of La-Z-Boy Chair Company to allow anything like that to happen.

MR. HANSEN: Well, I'm not even talking about allowing that. I mean, if he figured out that on his own, he's got to be a genius and it's okay, but if he figured it out in collaboration with—

MR. RALL: —with Bob—

MR. HANSEN: —Bob Reau or anyone in the La-Z-Boy organization, I think that's a different story—I mean, my business is private, and what I do with you—I mean, I don't particularly mind publicity or whatever, but from the standpoint of a competitor, I don't—I'm a tough merchant, but I have never in eleven years in this marketplace ever picked up the phone and said, 'Simmons, I want two sets of those mattresses that the Denver Dry got on their floor.'

MR. RALL: No.

MR. HANSEN: It's common practice in the city, and I don't operate like that. I buy my own programs, I do my own advertising, and go my own way—

MR. RALL: I know that.

MR. HANSEN: —and as far as I'm concerned, I started none of this, and this guy has been trying to take minimal shots at us, and as far as I'm concerned, he's my enemy, and I'm going to treat him as such, and I don't know what the hell is going to (p. 348) happen, Bob.

MR. RALL: Well, you understand our concern, because, of course, it gets picked up across the country and picked up by our competitiors and it's a—any time some-

body—you know—puts a—declare a price war on La-Z-Boy, and it's bad for us, but I was not aware of what you just said. Schroeder is on an airplane heading for our national sales meeting in Las Vegas, and I am following him up in a few hours, and I'll be out there in the morning. I'm going to get with Gary, and Bob Reau will be there, too and we're going to have a meeting there tomorrow morning when I get there, and we're going to talk about this—what you just said. I don't blame you. If Mauldin would have come in there with a different program than yours and shown a lot of styles like—

MR. HANSEN: (inaudible) showed a lot of styles. Like I say, my only concern is, did he know what we had on order and so forth, and pluck this thing out, and if so, how?—and that's my only concern with the guy. He can stay there forever, do what he wants, and I think my attitude has always been in business that we will be competitive. We set our prices, and if someone cuts them, they cut them. Then we cut their prices. It's a—that's what business is all about, but I'm not going to go down there and hold his hand or talk to him or anything and say, 'Let's do this,'—that's not the way I do business. Never have never will, and—

(p. 349) MR. RALL. Well, that's not your job. It's our job to see that there's not a conflict.

MR. HANSEN: Well—I mean, I don't think that's anyone's job—I mean, from the standpoint of trying to set up prices or anything—

MR. RALL: No, no. We can't—

MR. HANSEN: —and I think my attitude is, I'm a better merchant than most, and that if I can't be, they'll

kill me, and that's what—it's just like getting in the boxing as far as being in business. You've got to protect yourself and do what's necessary to run your own business, and that's all I've ever done. Now, if someone's going to stick their nose in my business, or they think they're going to pull up at my table and live off of me or something, they're going to have one hell of a tough time. That's—that's the way that I look at it. I set my own prices. They were designed to do my job and make me a profit and so forth, and I can't control one thing, you know, as far as what's going on with La-Z-Boy or who they're selling or what. Never have questioned or asked what they're going to do. I don't—I don't know, it just doesn't—it doesn't make a great deal of sense to me if Reau set that thing up against me—you know—from the—not set it up against me, but from the standpoint of saying, 'Here's what the guy's got on order and here's what you should have in stock'—and maybe, unwittingly, not knowing the guy is going to come in and cut my prices $1.95—(p. 350) you know—

MR. RALL: Well, Reau has—Bob has told him right from the beginning—you know—not to get underneath your prices. Bob told me that the other day. He says he's been talking about—talking, talking, talking to him, and he said when he come in with this hi-fi—you know—with those low prices on it, and hitting the chair—eight, forty-nine that you've been—you know—that's in your program, that you've been selling right along at a higher price—Bob was very much concerned about that. Bob was —I would—I would like to think that he did not do that. We were not a part of it here, and Bob should certainly not have done it. He's a pretty straight-forward guy. He

worked as my assistant for five years before he went out on the road, and I know him pretty well, but you never know about something—a situation like this. He might have just thought—well, shit, that's what's selling out there—you know—if Hansen's selling it, that's what selling, and I'll write the same order for Showcase Shoppe. I'm gonna find that out tomorrow morning. Tom, we just —I'm just going to say again—you know—we're—we understand you. We know you; we've known you for a long time, and we're not saying—you know—I don't—I don't want to change your way of doing business. We don't want to change anything. We don't want any big price wars, and I'm going to do everything I can to get it stopped. If it has to come down to being drastic about it with somebody, why, we will, but we—you know—we're the (p. 351) kind of people that like to keep everything as smooth as possible and keep the waters calm. That's the way we all do business, but I don't want to see your business hurt, and I don't want to see La-Z-Boy's business hurt either.

MR. HANSEN: Bob, you know, I can't—I have really a hard time—when I was out there in that sales meeting in November, December, whenever it was in Monroe—

MR. RALL: December.

MR. HANSEN: —in December of last year, I asked Gary Schroeder for a letter that I was the largest independent La-Z-Boy dealer in the country. I wanted to break a double truck in January, and we were going to go after maybe doubling our business. I programmed five or six carloads of chairs in a short period of time. The first car that is scheduled comes last; the last car comes first, and

one of the first cars out of the top is office chairs, which I wanted coordinated to your national advertising program. Gary said he was going to come out in a few weeks and bring his advertising man, and—from New York—and all of the available advertising, old and new, that they had available, that I might be able to use in either television or Rotogravure—which we buy a lot of and so forth—and that he was going to bring someone on a sales training session. Well, I think it's going on two years in October since we had our first chair on the floor, so we haven't been in the La-Z-Boy business two years. I think I've seen Bob Reau eight (p. 352) times, and I think five of those times we called his answering service, and a few days later he gets back to us and so forth, and I told Gary—you know—if I were a salesman, and here's a guy that professes he wants to double his business and he's already proven himself from the standpoint of the statement I first made Gary Schroeder—bumped into Louie Blumkin at market and I told him I was going to take over his number one spot my first year, and—which I did—

MR. RALL: Yeah.

(p. 353) MR. HANSEN: — and I would think this guy would be level with us — I mean, we have a turnover of salespeople. We've got probably eight people in our organization that has never seen Reau, from the standpoint of giving them any insight or training. I've had, I think, four transparencies from the La-Z-Boy Chair Company since we started in business, and trying to get anything — I mean, it's just like almost talking to the wall. Now, it's hard for me to understand, and I go along with it. Then I wonder what this La-Z-Boy Showcase store — from the standpoint of equal treatment — where are they getting —

have they got an artist on their staff: I haven't had — maybe they do. I haven't had any evidence, but most of their mats and things look factory prepared, and — not that we don't have our own advertising department and can't draw the chairs or photograph them at times and so forth — but it would be very, very helpful to get any type of cooperation — have them get the shipments — you know — when they're supposed to be coordincated, coordinated, and all of this crap come around by — with about the same timing that this guy is going to come in and sit down at my table and try and make a fool out of me in this marketplace. And I don't think he's about to, and like I say, if he picked out his own program and is not going to try and destroy whatever we're trying to build, I could care less, but when he pulls right up to my table and says he can cut my price a dollar (p. 354) and ninety-five cents, I just point the gun right at him, and —

MR. RALL: And you did.

MR. HANSEN: — I did, and we're still doing it, and I don't know — I don't particularly care what he does. I don't particularly relish it, because I think that we had a good head of steam and some momentum going, and I think that we were giving a better representation, probably, than anyone in the United States in both advertising and momentum and the willingness to go out and spend their own money and get a job done, and I think that if you look at your records and figures, that when you guys were down like 18 to 25 percent the final quarter of last year, Bob Reau had a 58 percent increase on the outside aside from us totally based on our advertising and so forth and saturated the marketplace. And with most merchants that handle La-Z-Boy chairs, they could live very, very nicely

off of our market structure and advertised prices, which I could give — you know — one damn about. But I even told him if they found a way to service a store of that nature, I might be interested in the thing myself, and I don't think I ever got a consideration at that particular time because maybe the thing was put together by last December — I don't know and don't particularly care, but — you know — as a businessman — I mean, that has had — you know — two experiences with La-Z-Boy Chair Company at Brandeis and here in Denver and so (p. 355) forth, it's sometimes hard for me to understand — you know — what your objectives are from the standpoint of business: what you want out of the marketplace and what direction and so forth that you're going, and — because of my thrust in the manufacturing and so forth — and there's a lot of rumors going around about me, and there always has been — you know — G. ry is concerned — am I going to stay in the retail business or what the hell, and he's heard rumors I'm going to concentrate on manufacturing, and I'm in the manufacturing business and that thing is growing, but I'm not going out of the retail business, and —

MR. RALL: Somebody told us that down in (inaudible) I even forget who it was.

MR. HANSEN: I'm consolidating to what I started out with and that is — you know — pure and simple sleep rather than being in the furniture business, and the La-Z-Boy chair thing was a very, very nice (inaudible) and it fits in with our seventeen to 29,000 foot stores, and it's — I've never dictated to any manufacturer — who are you going to sell or what are you going to do or whatever, but from the standpoint of objectives — I could see if a group of dealers or a dominant dealer or whatever were not do-

ing a good job for you or not giving a proper representation or having nine recliner lines and didn't give a damn what they sold or never spend any money building your name in the marketplace and so forth, I could see where (p. 356) you people would want to solve that problem by getting business elesewhere or building a new chain of distribution or whatever, but when you've got people that are willing to do by five fold anything that's ever been done in the history of your company as far as lineage in the newspaper and on television and so forth, to work to — you know — put a network of stores, and I recognize you make platform rockers and different things, but the big problem that I talked about when I was there in December is how do you deliver this package? You know, I'm having trouble at that time with deliveries on carloads of eight thirty-ones or carloads of eight fortynines or carloads of eight twenty-twos — whatever the hell it might be, and I wonder — you know — coming out of one plant, and — you know — in a single fabric and maybe three or four colors, how in the hell are you going to get two hundred and twenty-five — thirty chairs in the car from all of these different plants and one at a time and special orders and so forth, it's got to be — apparently possible, but in my understanding of business, I mean, I don't think that I could stay in business twelve months out of the year, you know in a reasonably dominant position, so —

MR. RALL: Tom, we've always had delivery problems. That continues to be because we —

MR. HANSEN: Well, I —

MR. RALL: — we always have outsold our production and we — you know — we fight them to keep up and

get up with (p. 357) us. We're looking for another plant right now. We fight that all the time, but it's just as hard to supply you as it

MR. HANSEN: (inaudible) — anyone in business — you know — I mean, if you could make eight thirty-ones, period, and come up with a hundred and fifty million dollars worth of business in next year, I think it would be a hell of a lot simpler than — you know — from the supply line and everything else, to — hold on just one second.

MR. RALL: Hello?

VOICE: Hi.

MR. RALL: I'm on a long-distance call.

VOICE: Oh, okay.

MR. HANSEN: Yeah, well —

MR. RALL: Well, you're right. It would be a lot easier.

MR. HANSEN: — and —

MR. RALL: — if we could do that, but we can't.

MR. HANSEN: I recognize that and, like I say, if you've got — however you regard your business by BPI or what you're doing in a certain market area versus others and so forth from the standpoint of judgments — I've always found a pretty good business practice that the easiest way to build a business is with existing accounts — you know — if you can get them off of their hind end to do something for you —

MR. RALL: That's true.

(p. 358) MR. HANSEN: —and get the job done rather than new dealers or whatever, but again, that's—that's

your judgment. Like I say, my only concern with the whole thing was if this guy has been shown what I had on order at the time and what our programs were, I think that's a pretty poor way of doing business, and —

MR. RALL: I do, too, Tom. You have more — you've added several things in your conversation here that have more than just one or two complaints at us, and basically you're right on all of them. I apologize —

MR. HANSEN: Yeah, but how long — how long does it take to sit down and write a letter? — you know — when a guy wants to run —

MR. RALL: Yeah.

MR. HANSEN: (inaudible) and so forth —

MR. RALL: I apologize —

MR. HANSEN: —and I talked to Bob Reau on the phone seventeen times, and talking to Gary the other day, I says, "I would still like to see him," because I've run some successful letter-type ads in the past, and it's something that I wanted to do, because — the other thing, by using your name on a store and using the wording — something to the effect that, "Denver's authorized La-Z-Boy dealer" or whatever — I mean, it sort of like cast a doubt in the consumer's mind — you know — are we authorized dealers?

(p. 359) MR. RALL: (inaudible)

MR. HANSEN: (inaudible) and I know that he's being cute in advertising, and I plan to answer him. But from the standpoint of cooperation, Gary asked me, could he come out and look at our sleeper factory sometime and

see what we're doing, and so forth. He might go into the sleeper business — "Sure, be my guest," and so forth, but these things are — you know — from the standpoint of wanting advertising materials and not being able to get them and so forth, and to see a newcomer on the scene apparently totally well supplied and fortified — it's hard to understand.

MR. RALL: Well, that I can't understand. We've got material here for everybody. If he's getting it and you're not — doesn't make any sense to me at all because we've got enough ad mats and slicks and glossies around here and transparencies for everybody.

MR. HANSEN: I know, but I — you know — it's just like I can't understand why Gary's never written me that letter when he said, "I'll get it off in the next day or two. You'll have it in January." I mean —

MR. RALL: Well, that I don't understand either.

MR. HANSEN: — and I even had to call Reau and talk to him and I even had Reau call him long distance one time from the office, and the damn thing never come. You send out plaques and so forth to dealers and say, "You're one of our (p. 360) top dealers" — or something — "last year" — from the standpoint of having some meaning in your planning.

MR. RALL: Are you going to be there tomorrow?

MR. HANSEN: Yeah. as far as I know. I'm going to take a tennis lesson tomorrow, and I'll be out of the office probably from noon till 2:30 or some clarification on that. Otherwise, I'll be here all day.

MR. RALL: We're going to be in Vegas. The guys are there now. I'll be there in the morning. I'm going to get together with them, and I'm going to call you from there tomorrow. I — one of us is coming — Gary or I, and maybe both of us — but we're going to be there before this month is out. You can mark that down.

MR. HANSEN: Okay, fine.

MR. RALL: All right.

MR. HANSEN: Okay.

MR. RALL: Thank you.

EXHIBIT 3 (TR. III P. 362)

(p. 362) VOICE: Hello?

MR. HANSEN: Yeah, it's what — June —

VOICE: 23rd.

MR. HANSEN: — 23rd, 1976, calling Bob Rall in Chicago. Okay?

VOICE: Okay.

MR. HANSEN: Hello?

MR. RALL: Bob Rall.

MR. HANSEN: Hi, Bob.

MR. RALL: How are you?

MR. HANSEN: Pretty Good.

MR. RALL: I'm in Chicago —

MR. HANSEN: Uh-huh.

MR. RALL: — and I spent — oh, I would say — one, two, three, four — four and a half hours in the vice-president's — Mr. Lutz's office. He's the vice-president of Montgomery Ward, and he's got your ad pinned up on the wall, and he almost pinned me up on the wall, too. You surprise me. I — you know — I thought maybe we'd be able to sit down and discuss things as far as the Lazy-Boy Showcase Shop is concerned, but I had no idea what you were going to do with the Montgomery Ward situation there, so — we're very much concerned about it now, Tom. We don't really know at this moment exactly what we're going to do. I presume that you know that we have your company on a credit hold now, and — you know — we can't

Supreme Court, U.S.
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No. 85-64

In The

Supreme Court of the United States

October Term, 1985

WORLD OF SLEEP, INC.,
Cross Petitioner,

v.

LA-Z-BOY CHAIR COMPANY;
MONTGOMERY WARD & CO., INC.;
ARTHUR MAULDIN, individually and
d/b/a LA-Z-BOY SHOWCASE SHOPPE,
Cross Respondents.

BRIEF OF MAULDIN CORPORATION AND ARTHUR MAULDIN IN OPPOSITION TO CROSS PETITION OF WORLD OF SLEEP FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

Is there any basis for granting review of a summary judgment entered on behalf of the Mauldin Corporation and Arthur Mauldin where both the district court and the court of appeals found as a matter of fact and law that there was insufficient evidence admissible against Mauldin of its participation in the alleged antitrust conspiracy?

DESIGNATION OF PARTIES

The petitioner and respondent/cross petitioner are identified in the caption appearing on the cover of the cross petition. Cross respondents are the Mauldin Corporation and Arthur Mauldin d/b/a La-Z-Boy Showcase Shoppe. Although Jeff D. Mauldin is listed on the caption of the opinion by the court of appeals, he was never served and accordingly never became a party to this case.

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OPINIONS BELOW

The opinion of the court of appeals is reported at 756 F.2d 1467 and is printed in the Appendix to the cross petition. The opinion of the district court granting summary judgment in favor of cross respondents is not reported but is printed in the Appendix to this opposition brief.

STATEMENT OF THE CASE

Cross petitioner World of Sleep, Inc. requests this Court to issue a writ of certiorari to review a decision by the court of appeals which affirmed the entry of summary judgment by the district court on behalf of cross respondents Arthur Mauldin and the Mauldin Corporation ("Mauldin defendants"). The district court rejected World of Sleep's claims that the Mauldin defendants were participants in a conspiracy to violate Section 1 of the Sherman Act, 15 U.S.C. § 1, because it concluded, on two separate occasions, that there was insufficient admissible evidence of such alleged participation. Accordingly, the district court granted summary judgment and the court of appeals affirmed that judgment. The pertinent procedural history of this case is as follows.

On December 10, 1979, World of Sleep filed its complaint against La-Z-Boy Chair Company ("La-Z-Boy"), Montgomery Ward & Co., Incorporated ("Wards"), Arthur Mauldin, and the Mauldin Corporation, the Mauldins collectively doing business as "La-Z-Boy Showcase Shoppe," charging the defendants with violations of Section 1 of the Sherman Act, 15 U.S.C. § 1. In a separate claim for relief, World of Sleep charged La-Z-Boy, alone, with price discrimination in violation of the Robinson-Patman Act, 15 U.S.C. § 13.

After nearly two years of discovery, including numerous depositions and production of volumes of documents, the Mauldin defendants, on November 7, 1981, filed a motion for summary judgment. The Mauldin defendants contended that the undisputed facts of record failed to demonstrate that the Mauldin defendants par-

ticipated in a conspiracy as alleged by World of Sleep. In support of the motion for summary judgment, the Mauldin defendants, pursuant to Rule 56, F. R. Civ. P., submitted excerpts from the deposition testimony of witnesses Mauldin, Rall and Schroeder, who testified that there was no agreement or conspiracy involving the Mauldin defendants, and whose factual testimony refuted the conspiracy theory hypothesized by World of Sleep.

In response to the Mauldin defendants' summary judgment motion, World of Sleep offered no admissible evidence by way of deposition testimony, affidavit or documents to refute any of the testimony of defendant Mauldin, or witnesses Rall and Schroeder.

At oral argument on Mauldin's motion, held on December 29, 1981, World of Sleep's counsel made unsupported assertions that the Mauldin defendants' newspaper advertisements and sales tickets would show that the Mauldin defendants "kept their prices up," but offered no admissible evidence in support of this argument. The district court found that this offer of evidence was not in the form required by Rule 56, F. R. Civ. P. Nevertheless, the district court assumed for purposes of summary judgment that the evidence would show what counsel represented it would show. The court concluded, nonetheless, that World of Sleep had not supported its claims and found, instead, that the Mauldin defendants were entitled to summary judgment.

In opposition to the Mauldin defendants' motion for summary judgment, World of Sleep also sought to introduce transcripts of surreptitious tape recordings made by its principal, Thomas Hansen, of telephone conversa-

tions between Hansen and Rall, an employee of co-defendant La-Z-Boy Chair Company. Copies of the transcripts were the only documents attached to World of Sleep's opposition brief submitted to the district court. The district court ruled that the transcripts were not admissible as against the Mauldin defendants because the taped conversations, being out-of-court statements, are hearsay as to the Mauldin defendants, and the comments attributed to Mauldin on the tapes were "hearsay upon hearsay." See Appendix hereto ("App."), p. 2. The court also found that World of Sleep failed to make a showing by independent evidence of the existence of a conspiracy, or that the statements attributed to Mauldin were made in furtherance of the conspiracy. Accordingly, the district court, relying on *United States v. Andrews*, 585 F.2d 961 (10th Cir. 1978), and *United States v. Peterson*, 611 F.2d 1313 (10th Cir. 1979), *cert. denied*, 447 U.S. 945 (1980), held that the taped conversations were not admissible under Rule 801(d)(2)(E) of the Federal Rules of Evidence as statements of a co-conspirator. The court therefore concluded there was no substantial, independent, admissible evidence that the Mauldin defendants were involved in a conspiracy with La-Z-Boy and Wards, and granted summary judgment.

The district court ruled that summary judgment was "especially appropriate" in this case:

> "It became painfully obvious at the December 29 hearing that this discovery has been almost entirely fruitless as to these [Mauldin] defendants. Trial is set for twenty court days. To force upon these defendants the expense, emotional strain, and time loss incident to defending themselves in such a trial, on the thin thread of plaintiff's asserted evidence against them, would be unconscionable." (App., p. 4.)

Despite the strongly worded findings of the district court, World of Sleep, on January 6, 1982, filed a motion for reconsideration of the summary judgment order. At an *in limine* hearing held on January 11, 1982, involving this and other issues, World of Sleep purported to offer further evidence of the Mauldin defendants' participation in the conspiracy. After hearing World of Sleep's evidence, the district court orally confirmed its earlier order and denied the motion for reconsideration.

The court of appeals affirmed the district court's decision in an opinion issued on March 4, 1985. In reviewing the district court's decision, the court of appeals viewed the evidence in the light most favorable to World of Sleep, recognized that summary procedures should be used sparingly in complex antitrust issues, and yet held that the district court's grant of summary judgment was proper. (Appendix to cross petition, pp. 11a-13a.) Specifically, the court of appeals concurred with the district court that the supposed independent, non-hearsay evidence of the Mauldin defendants' conduct "did not constitute sufficient independent evidence to establish Mauldin's participation in a price-fixing conspiracy, and that the hearsay statements [offered by World of Sleep] therefore were not admissible against him." (Appendix to cross petition, p. 13a.)

———o———

REASONS FOR DENYING THE WRIT

Cross petitioner World of Sleep has presented four distinct questions and asserts four distinct reasons in support of its request for a writ of certiorari to review the decision of the court of appeals. The only question

and reason which pertain to the Mauldin defendants is the issue of whether summary judgment was properly granted and affirmed. (Question No. 3 and Reason III in World of Sleep's cross petition.) Accordingly, this brief addresses only that issue. The Mauldin defendants contend that even if the Court were to grant a writ of certiorari as to the other issues and other parties, it should specifically deny the request for a writ insofar as it pertains to the Mauldin defendants, for the following reasons.

I

THE DECISION OF THE COURT OF APPEALS AFFIRMING THE GRANT OF SUMMARY JUDGMENT IS NOT IN CONFLICT WITH THE DECISIONS OF ANY OTHER COURT OF APPEALS AND CORRECTLY FOLLOWS THE TEACHINGS OF THIS COURT.

Both the court of appeals and the district court below applied the Federal Rules of Evidence and the standards for granting summary judgment consistent with the rulings of other courts of appeals and the holdings of this Court.

A. The District Court Properly Granted, and the Court of Appeals Properly Affirmed, a Summary Judgment Entered in Accordance With Rule 56, F. R. Civ. P.

The district court below was presented with undisputed admissible evidence in the form of deposition testimony which plainly and thoroughly refuted World of Sleep's claims of the Mauldin defendants' participation in an antitrust conspiracy. Rule 56(e), F. R. Civ. P., expressly provides that when a motion for summary judgment is made and supported by deposition testimony, the party opposing the motion "may not rest upon the mere allegations" of its complaint. Its response, by affidavit

or otherwise, must set forth "specific facts showing there is a genuine issue for trial." World of Sleep produced no admissible evidence to refute the Mauldin defendants' showing and therefore under Rule 56(e), F. R. Civ. P., failed, as the court below found, to meet its burden of demonstrating significant probative evidence to support its complaint. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289-290 (1968). As the district court stated in its Order:

> "Defendants Mauldin and Mauldin Corporation have already been dragged through many months of expensive, time consuming discovery. It became painfully obvious at the December 29 hearing [on the summary judgment motion] that this discovery has been almost entirely fruitless as to these defendants. Trial is set for twenty court days. To force upon these defendants the expense, emotional strain, and time loss incident to defending themselves in such a trial, on the thin thread of [World of Sleep's] asserted evidence against them, would be unconscionable." (App., p. 4.)

Extensive discovery had been taken in this case and the requirements of Rule 56 were met by the moving party, but not by the opposing party. Because the Mauldin defendants' motion was supported by the evidence and not contradicted, summary judgment was appropriate.

B. The District Court Properly Rejected Hearsay Evidence and Excluded Such Evidence From Its Consideration on Summary Judgment, and the Court of Appeals Properly Affirmed That Decision.

In ruling on the motion, the district court also considered, but rejected as inadmissible against the Mauldin defendants, the surreptitious tape-recorded conversations

offered by World of Sleep. These tape recordings were the only evidence World of Sleep attempted to get on the record in opposition to the summary judgment motion. The conversations were between Rall, a La-Z-Boy employee at the time of the conversations, and Hansen, the president of World of Sleep. The trial court correctly ruled that these conversations were hearsay on hearsay, inadmissible against Mauldin. As the court stated, "[n]either Mauldin nor anyone purporting to speak for him was a party to the taped conversation." (App., p. 2.)

World of Sleep attempted to skirt the fact of inadmissibility by claiming that independent evidence of Mauldin's participation in the alleged conspiracy warranted a finding of admissibility under the co-conspirator exception to the hearsay rules, Fed. R. Evid. 801(d) (2) (E). Rule 801(d) (2) (E) deems statements, otherwise hearsay, to be admissible against a party if made by a co-conspirator during the course or in furtherance of the conspiracy. Rule 801(d) (2) (E) as applied by the Tenth Circuit in *United States v. Andrews,* 585 F.2d 961 (10th Cir. 1978), however, requires that "testimony, otherwise hearsay, offered against a co-conspirator cannot be admitted unless the existence of the conspiracy is established by independent evidence." *Id.* at 965-966. *See also United States v. Peterson,* 611 F.2d 1313, 1330 (10th Cir.), *cert. denied,* 447 U.S. 945 (1980). The independent evidence must show that it is more likely than not that a conspiracy existed, that the declarant was a member of the conspiracy and that the statements made were in furtherance of the conspiracy. *Andrews,* 585 F.2d at 965. The trial court found that World of Sleep had "submitted no substantial, independent, admissible evidence that Mauldin was involved in

a conspiracy with La-Z-Boy and Wards." (App. p. 3.) The court found that the supposed "independent evidence," Mauldin's sales tickets and advertising, fell "far short of establishing that Mauldin was more likely than not involved in a conspiracy," the showing required by *Andrews, supra.* (App., p. 3.) The trial court therefore correctly concluded that World of Sleep had "shown no admissible evidence, nor even claimed to have adequate admissible evidence, to permit a finding that Mauldin was involved in a conspiracy with La-Z-Boy and Wards." (App., p. 4.) The court of appeals reviewed, and specifically agreed with, this evaluation of the evidence offered by World of Sleep.

Application of the "substantial independent evidence" rule hardly constitutes a conflict with other circuits. As the cross petition candidly concedes, that rule has been adopted and followed by at least nine other circuits in addition to the Tenth Circuit. (See cross petition at 26, n. 5.) By following its own rule, as specified in *U.S. v. Peterson,* 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. denied,* 447 U.S. 905 (1980), the Tenth Circuit applied the majority rule and followed a case in which this Court had previously denied certiorari.

II

THE CROSS PETITION APPEARS TO SEEK TO RAISE AN ISSUE WHICH WAS NOT RAISED BELOW.

Although World of Sleep concedes that the substantial, independent evidence rule is followed by most circuits, it now appears, for the first time, to be arguing that this rule, as delineated by the Tenth Circuit in *United States v. Peterson,* 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. de-*

nied, 447 U.S. 905 (1980), and the related procedure of conducting a pretrial *in limine* hearing on the question of whether substantial independent evidence exists, as outlined by the Fifth Circuit in *United States v. James,* 590 F.2d 575 (1979), should not have been followed at all.

In the courts below, both at the district and appellate levels, World of Sleep did not argue that the "independent evidence rule" should not be applied. Nowhere in its brief to the court of appeals did World of Sleep contend that the *Peterson* decision was wrongly decided and should be overruled. All that World of Sleep argued below was that the district court erred in reaching its conclusion that there was not substantial independent evidence of Mauldin's participation in the alleged conspiracy. If the cross petition is in fact asking this Court to overturn the "substantial, independent evidence" rule enunciated in *Peterson,* and followed by at least nine other circuits, that request should be denied because it was never made below.

III

THE PETITION DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW.

If, on the other hand, cross petitioner acknowledges that the "independent substantial evidence" rule is the appropriate standard, and it acknowledges, as it must, that this standard was applied by the courts below, this petition does not raise an important question of federal law. Rather, the cross petitioner is merely asking this Court to grant a writ of certiorari so as to give this Court the opportunity to weigh the supposed independent evidence to see if it disagrees with the conclusions reached by the courts below. The re-evaluation of evidence is hardly the

function of this Court nor the purpose to be served by the issuance of a writ of certiorari.

As noted above, the trial court both accepted an offer of proof from World of Sleep's counsel, and conducted an *in limine* hearing at which World of Sleep was given the opportunity to present its supposed independent evidence of the Mauldin defendants' participation in the alleged conspiracy. The trial court heard all the evidence. It concluded that the evidence fell "far short" of proof of participation in a conspiracy. The court of appeals agreed. World of Sleep has given no reason for this Court to have to review the carefully considered conclusions reached by the courts below.

———o———

CONCLUSION

This case presents no legal issue under either the Federal Rules of Civil Procedure or the Federal Rules of Evidence worthy of review. The decisions of the courts below insofar as they grant summary judgment to the Mauldin defendants pose no conflict among the circuits or with the controlling decisions of this Court. The petition does not present an important question of federal law. The writ should be denied.

Respectfully submitted,

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August 2, 1985

APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 79-C-1677

WORLD OF SLEEP, INC.,
Plaintiff,

v.

LA-Z-BOY CHAIR COMPANY; MONTGOMERY WARD & CO., INCORPORATED; ARTHUR MARK MAULDIN, JEFF D. MAULDIN, individually and doing business as LA-Z-BOY SHOWCASE SHOPPE, and MAULDIN CORPORATION,
Defendants.

ORDER

(Filed January 5, 1982)

Defendants, La-Z-Boy Chair Company, Montgomery Ward & Company, Inc., and Arthur Mauldin and Mauldin Corporation, filed motions for summary judgment and extensive briefs.[1] Following oral arguments on December 29, 1981, La-Z-Boy's and Ward's motions were denied. The motion of Mauldin and Mauldin Corporation was taken under advisement. This order constitutes my ruling on the latter motion.

The only evidence available to the plaintiff that possibly might involve Mauldin in the alleged conspiracy is a series of taped telephone conversations between representatives of World of Sleep and a representative of La-Z-Boy. In these conversations the La-Z-Boy representative mentions that he has spoken with Mauldin about keep-

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[1]Defendant Jeff D. Mauldin was never served.

ing his prices up and that Mauldin told La-Z-Boy that he would do so. Neither Mauldin nor anyone purporting to speak for him was a party to the taped conversations.

As to Mauldin and his corporation, the taped conversations, being out of court statements, are hearsay, and the comments there attributed to Mauldin are hearsay upon hearsay. Generally, therefore, the references to Mauldin would not be admissible in evidence.

Plaintiff, however, relies on Rule 801(d) (2) (E)[2] of the Federal Rules of Evidence which provides that statements of co-conspirators made in the furtherance of a conspiracy are excepted from the hearsay barrier. Before such co-conspirator admissions may be admitted, however, there must be an independent showing that the conspiracy existed and that the party against whom the evidence is proffered was a member of the conspiracy. *United States v. Andrews*, 585 F.2d 961 (10th Cir. 1978). In *United States v. Petersen*, 611 F.2d 1313 (10th Cir. 1979), the Court required that three elements be shown by independent evidence before the hearsay may be admitted: (1) the conspiracy existed, (2) the declarant and the defendant against whom the conspirator's statement is offered were

---

[2]Plaintiff also argues that the conversations should be admitted under Rule 803(24), the residual exception to the hearsay rule. Rule 803(24) was intended, however, to allow for the development of new exceptions to the hearsay rule not already provided by the Rules of Evidence. *See e.g., United States v. Mandel*, 591 F.2d 1347 (4th Cir. 1979). Since Rule 801(d) (2) (E) already excepts admissions of coconspirators, such statements do not come within the intended purpose of Rule 803(24). Moreover, Rule 803(24) is not intended to allow a trial judge free rein to admit hearsay evidence whenever his or her general sense of justice urges its admission. Such an interpretation would abolish the hearsay rule.

members of the conspiracy, and (3) the statement was made during the course of and in furtherance of the objects of the conspiracy.

Plaintiff has submitted no substantial, independent, admissible evidence that Mauldin was involved in a conspiracy with La-Z-Boy and Ward. At the hearing on this matter, however, plaintiff's counsel cited what she characterized as such independent evidence the plaintiff would present at trial. Counsel stated that the plaintiff would offer the results of a survey of Mauldin's advertising during the period of the alleged conspiracy which would show that Mauldin changed its advertising shortly after the alleged conspiracy began. According to counsel, prior to the taped telephone conversations, Mauldin's advertising was more price oriented than it was after the alleged agreement between the defendants. Plainitff's other evidence would be a review of Mauldin's sales tickets during this time period to show that Mauldin's best selling chairs were the same models which were World of Sleep's best sellers.

For the purposes of this motion I have assumed that the plaintiff's evidence at trial would show what was asserted by counsel, even though that evidence was not put into the record in the form required by Rule 56. I nevertheless find that the asserted evidence falls far short of establishing that Mauldin was more likely than not involved in a conspiracy with La-Z-Boy and Ward.

While summary judgment is a drastic measure and rarely should be granted, where there is no significant evidence supporting the complaint, summary judgment is appropriate. *First National Bank v. Cities Service Co.*,

391 U.S. 253 (1968). The remedy is especially appropriate here. Defendants Mauldin and Mauldin Corporation have already been dragged through many months of expensive, time consuming discovery. It became painfully obvious at the December 29 hearing that this discovery has been almost entirely fruitless as to these defendants. Trial is set for twenty court days. To force upon these defendants the expense, emotional strain, and time loss incident to defending themselves in such a trial, on the thin thread of the plaintiff's asserted evidence against them, would be unconscionable.

In summary, I find that the plaintiff has shown no admissible evidence, nor even claimed to have adequate admissible evidence, to permit a finding that Mauldin was involved in a conspiracy with La-Z-Boy and Ward.

Accordingly, it is

ORDERED that Arthur Mauldin and Mauldin Corporation's motion for summary judgment is granted, and all claims as to them are dismissed with prejudice, each party to pay his or its own costs.

DATED at Denver, Colorado, this 5th day of January, 1982.

BY THE COURT:

/s/ Jim R. Carrigan, Judge
United States District Court

ship (p. 363) you anything. Our plan is to leave you right there until we can figure out exactly what's gonna happen, and we're very sorry that any of this is happening.

I had no explanation for these people at Montgomery Ward — you know. I said, "I don't know." I said, "I don't know." I don't know why the man ran an ad like that — you know — using Montgomery Ward. So I don't know that you have a reason or that you want to tell me if you do have one.

MR. HANSEN: Well, that ad run before you'd called me this last time. In fact, it run that morning —

MR. RALL: Yeah, I know.

MR. HANSEN: You called me the other day —

MR. RALL: I know it. When I got out to Las Vegas, I ran into just a little bit of a time problem. I did sit down and talk to Gary for a few moments and then Bob separately and never got 'em together. So I had to fly back here, but I had told them both that I'd promised to call you, which I had promised to do — and I still think — you know — somebody is going to get out there pretty fast. Hopefully it will be Gary and I together if he — I can get his schedule worked out right.

But I really wanted to tell you that I took a beating over there. I'm responsible for Montgomery Ward, and they know me real good, and I feel just a little bludgeoned right now. I'm calling — I promised you I'd call, so I'm calling, but I'll get back to you after I get back home. I'm still in (p. 364) Chicago, and after I get back home and get a chance to sit down and talk to Gary, I'll call you back then —

MR. HANSEN: Did you talk to Reau about what we had discussed from the standpoint of —

MR. RALL: I only — just briefly. I told him what you'd said. I said, "Bob," I said, "tell me, did you — you know — write an order for the Lazy-Boy Showcase Shop that was similar to or — you know — like what Tom's program is?" And he said, "No," he said, "I did not do that." He said, "You know, he's got some of the some styles and some of the same colors," he said, but — he said, "He is not running Tom's program." He said, "I can't stop some similarity in there," but he said, "I did not purposely do that;" and I said, "Tom thinks you did or somebody did," and I said, "so — but I wanta come and look at it and that's one of the things I'm gonna do when I come there — take a look at that program and see exactly what it is."

But — I talked to Art Mauldin. I said, "Art," I said, "do you realize that you have a lot of similar styles?" He said, "I realize that."

MR. HANSEN: I'm not talking about similar styles. I'm just talking about their stock position —

MR. RALL: Yes.

MR. HANSEN: — when they opened —

MR. RALL: Okay.

(p. 365) MR. HANSEN: — the identical frames and covers that were the strongest in our program, and I don't think that they have any knowledge whatsoever of what we bought or what we had on order, like I explained to you —

MR. RALL: No, Art Mauldin didn't know. I talked to him, and he said, "No," he said, "I don't even know what

you mean'' — you know — he didn't know, and Bob had said, no, that he did not do that — you know — I mean, that he did not do that on purpose, so — but I have not really had the chance to sit down and take the time and sensibly discuss it, and I think it should be done right there, so that's the reason for the visit. I only — I got in there late on Thursday and I left Saturday morning, and we had a meeting all day — we had a meeting Thursday night and one all day Friday, so I — I really could not get the two of those guys together —

MR. HANSEN: Uh-huh.

MR. RALL: — Gary and Bob, so I'm going to — like I say, come out there and take a look at it for myself, so —

MR. HANSEN: Okay. And when do you think you'll be out?

MR. RALL: I don't know. I'm going to call you Friday. What I want — I don't know what Gary's schedule is. Gary is not there right now, and he won't be there tomorrow, and he didn't come here to Chicago, so I don't really know what the devil his schedule is. I talked to him about the Montgomery (p. 366) Ward ad — you know — I mean, about the ad that you ran with Montgomery Ward in it. I mentioned that to him this morning because he knew that they had called me for a command performance to come over there today, so he did not say anything about it that meant anything. He just said, "Well, let's wait till you get back, and we'll talk about it Friday." I asked him then if he knew what his schedule was, and he said he'd rather talk about it on Friday, so I don't know exactly what it is.

But I'll get to you — I'll get back to you on Friday, because I'd like to have it be the first part of next week.

MR. HANSEN: Okay. I'm going to leave town Saturday, and I'll probably be back in here — at the latest, Wednesday, but probably Tuesday.

MR. RALL: Okay.

MR. HANSEN: I'd like to sit down and see what's going to happen.

MR. RALL: Yes, we would too. Yes, we have to.

Okay, Tom, I'll call you on Friday.

MR. HANSEN: Okay, fine.

MR. RALL: All right, thank you. Good-bye.

* * *

EXHIBIT 4 (TR. III P. 368)

(p. 368) MR. STANGE: Bob?

VOICE: Mr. Stange?

MR. STANGE: Yeah.

VOICE: Hold on just a second, please.

MR. RALL: Bob Rall.

MR. STANGE: Bob, Bill Stange, World of Sleep in Denver.

MR. RALL: How are you today, Bill?

MR. STANGE: Pretty good. Don't think I've ever met or talked to you.

MR. RALL: I don't think so either.

MR. STANGE: Were you out here before?

MR. RALL: No.

MR. STANGE: Okay. Tom Hansen had to leave town and he asked me to give you a ring.

MR. RALL: All right.

MR. STANGE: I understand that you were going to call him this afternoon or he was to call you or something and work out some sort of a meeting for next week when he gets back into town.

MR. RALL: I talked to Bob Reau about — oh, it's been a couple hours now, and I told Bob to try and get ahold of Tom and get back to me and I haven't heard back, so obviously he hasn't been able to contact him.

MR. STANGE: Yeah.

MR. RALL: Tom told me he was going to leave tomorrow (p. 369) and be back on Tuesday.

MR. STANGE: Ah, he got away this afternoon, and he said he would be back Tuesday.

MR. RALL: I'm coming Thursday.

MR. STANGE: Thursday you'll be out?

MR. RALL: Yeah. That — if that timing is all right with him, I right now have it tentatively set to be there Thursday morning at ten o'clock.

MR. STANGE: Okay. Do you want us to pick you up?

MR. RALL: No, Bob Reau will pick me up.

MR. STANGE: Okay, so you'll be out around Thursday morning at ten, eh?

MR. RALL: I'll be at your place — I'll be shaking your hand at ten o'clock that morning.

MR. STANGE: Real good. We're doing a pretty good job for you out here, aren't we?

MR. RALL: Yeah, you sure are, Bill.

MR. STANGE: Huh?

MR. RALL: If you want to see some blood running down a guy's back —

MR. STANGE: No, we've moved a ton of chairs.

MR. RALL: Sure have. I spent four hours in Montgomery Ward vice president's office the other day, Wednesday afternoon after I — before I talked to Tom. Montgomery Ward — you know?

(p. 370) MR. STANGE: Yeah?

MR. RALL: They give us twelve million dollars a year, Bill.

MR. STANGE: They do that much with you?

MR. RALL: Yup.

MR. STANGE: I knew they were a big account. I didn't know that they did twelve mill with Lazy-Boy, though.

MR. RALL: They're big.

MR. STANGE: That doesn't leave you any business elsewhere, does it, if you do that much with them?

MR. RALL: Well, we were doing nice business with you up until the time we put you on credit hold because you people haven't been paying your bills.

MR. STANGE: Well — you know — that's a sore point I think — both with Tom and with myself, because I get involved in the accounting and bookkeeping end of it — and — you know — these shipments that were ordered here back in January — these things got all screwed up. They didn't come when they were ordered, the dating was incorrect on some of the invoices, and — we had planned to discount these — you know — pretty much as we scheduled them and talk to Reau about them, and they just flat got all bollixed up and didn't come in in any reasonable order as to what Tom's program was on advertising and selling them, and so it — we've got — you know — some checks we're working on now in these shipments — (p. 371) getting the things put together, and in looking through some of them, a lot of them aren't even due yet. As a matter of fact, there's —

MR. RALL: No, you — there's quite a few that are not due, and we're not talking about those. We're talking about all of those that are past due. We don't care about those that are not due yet.

MR. STANGE: I don't know that there is — all of those are past due yet. I think the comptroller said — I think 25,000 last week, and — you know — we should be so close to current that I don't really understand the reasoning in putting a credit hold on it.

MR. RALL: Well, that's — Bill, that's been on there for almost a month now, a little more than that, if I'm not mistaken. I'm having our people get me a computer printout — you know — on these shipments and payments for the past six months, and I'm going to bring it with me, you know, if you want to get your records together, why I'd be more than happy to sit down — you know — and go over them and see what the situation is.

MR. STANGE: Yeah, because —

MR. RALL: That's why I'm coming.

MR. STANGE: Uh-huh, because we really have had no problems over the past nearly two years, and it is very irritating now when we have some custom orders that are (p. 372) going begging — you know — over some apparent credit problem, and I don't think this thing would have ever developed if the merchandise would have been — you know — planned in and shipped in one time and everything.

MR. RALL: Well, you have to plan your business, and although our deliveries are bad — we admit to that; they're not the greatest. We do the best that we can, and

I think you'll find, if you get into it, that we've serviced your account very well. We might have been late here and there — a few — maybe for cover or something else, but you programmed them out. You got them pretty close, but we slipped a couple of times, but you got them pretty close.

But — well, like I say, you have to run your business. If you think that that's why the situation is what it is today, well, then, that's the way you think.

MR. STANGE: Yeah.

MR. RALL: But we have to run our business, too, and so — and we're both, I think, big enough to sit down and take a look at it and see what the problem is, and we'll try and get it solved if possible. That's what I'm coming out for.

MR. STANGE: Uh-huh. Is Gary coming out too?

MR. RALL: No.

MR. STANGE: He can't make it, or —

MR. RALL: No, Gary — Gary won't — Gary's going to be in New York at that time. He's already got a full schedule (p. 373) all of next week, and the following week we are going to be on vacation. They close this whole place down for two weeks, and so it will be myself and Bob Reau.

MR. STANGE: Uh-huh. Well, I'll be talking to Tom probably tonight. I'm sure he's going to be disappointed that Gary didn't — you know — see fit to come out and sit down and talk to him.

MR. RALL: Well —

MR. STANGE: No reflection on you, Bob —

MR. RALL: No, none whatsoever. It's perfectly all right —

MR. STANGE: (inaudible) — be able to handle that, but Tom had rather thought after talking to Gary a month or so ago, that Gary was going to come on in and —

MR. RALL: That was Gary's plan, but things have got kind of tightened up on him, and he's going one way and I'm coming west, and he's going east, so — I'll be there, though.

MR. STANGE: Okay. Well, we'll see you Thursday morning, then, Bob.

MR. RALL: Tom had already — when Tom was talking to Gary, Gary had told him at that time that he was planning to come out later, and he kind of scheduled himself to come out there in August, anyway, so — you know — I'm sure Gary will come out afterwards — you know. If he said he'd be there he would. When I was talking to Tom a few weeks ago there (p. 374) on the 16th, I said to him, you know, I'd talk to Gary and see if he could get out — you know sometime the end of this month, and he's just not able to do it, but he'll be along. He'll be along there as soon as we get our vacations over with.

MR. STANGE: Yeah. Okay, Bob. We'll see you, then, Thursday.

MR. RALL: Okay, Bill.

MR. STANGE: All right, good-bye.

MR. RALL: Nice talking to you. Bye.

* * *

Supreme Court, U.S.
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No. 85-64

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

WORLD OF SLEEP, INC.,
Cross Petitioner,

v.

LA-Z-BOY CHAIR COMPANY;
MONTGOMERY WARD & CO., INC.;
ARTHUR MAULDIN, individually and
d/b/a LA-Z-BOY SHOWCASE SHOPPE,
Cross Respondents.

On Cross Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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BRIEF IN OPPOSITION OF CROSS RESPONDENT MONTGOMERY WARD & CO., INCORPORATED

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QUESTION PRESENTED

Did the Court of Appeals correctly determine that there was insufficient independent evidence of a conspiracy involving Montgomery Ward & Co., Incorporated and consequently hold that certain tape recorded telephone conversations were not admissible in evidence against Montgomery Ward under Rule 801(d)(2)(E) of the Federal Rules of Evidence, when Montgomery Ward was not a party to those conversations?

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BRIEF IN OPPOSITION OF CROSS RESPONDENT MONTGOMERY WARD & CO., INCORPORATED

OPINION BELOW

The opinion of the Court of Appeals is reported at 756 F.2d 1467 and is printed in the Appendix to the Cross Petition.

STATEMENT OF THE CASE

World of Sleep, Inc. ("World of Sleep") claims that La-Z-Boy Chair Company ("La-Z-Boy"), Montgomery Ward & Co., Incorporated ("Montgomery Ward") and

Arthur Mauldin, individually and doing business as La-Z-Boy Showcase Shoppe ("Mauldin"), conspired to deny World of Sleep access to La-Z-Boy reclining chairs for resale in Denver, Colorado, in violation of Section 1 of the Sherman Act. 15 U.S.C. § 1.[1] The District Court granted summary judgment for Mauldin and entered judgment on a jury verdict for La-Z-Boy and Montgomery Ward. The Court of Appeals affirmed the summary judgment in favor of Mauldin, affirmed the judgment in favor of Montgomery Ward on the ground that it had been entitled to a directed verdict and reversed the judgment with respect to La-Z-Boy because it found error in the jury instructions. The Court's opinion as to La-Z-Boy is not at issue in this cross petition.[2]

The Competitive Position of the Parties in the Denver Market

Montgomery Ward is a nation-wide retailer of consumer products, headquartered in Chicago. It has a number of retail stores in the Denver area and, during the years at issue in this case, its yearly sales volume in metropolitan Denver exceeded $20,000,000. World of Sleep was essentially a single product-line operation with a few stores in the Denver area, concentrating on mattresses and related items as a discount "sleep shop."

In 1974, World of Sleep added La-Z-Boy reclining chairs to its product line. La-Z-Boy already had a number of dealers in the Denver area, including Montgomery Ward, which had sold La-Z-Boy chairs for years. While Montgomery Ward was La-Z-Boy's single largest customer by virtue of its nation-wide sales volume, La-Z-Boy

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[1] Montgomery Ward is a wholly-owned subsidiary of Marcor, Inc., which is in turn a wholly-owned subsidiary of Mobil Corporation. All of Montgomery Ward's subsidiaries are wholly-owned.

[2] The Court below also entered judgment on a jury verdict for World of Sleep on its claim against La-Z-Boy under the Robinson-Patman Act. 15 U.S.C. § 13(e). Montgomery Ward is not involved in that claim and this brief will not address it.

reclining chairs did not represent a particularly significant component of its merchandising program. La-Z-Boys were not even the best selling brand of reclining chairs for Montgomery Ward because La-Z-Boy chairs tended to be priced toward the upper end of the reclining chair spectrum. Rec. XII, at 2030. Consistent with its merchandising philosophy of appealing principally to the broad middle range of consumers, Montgomery Ward had far more retailing success with reclining chair lines in the middle of the price-range, such as Shannon. Rec. XII, at 2030. Montgomery Ward's furniture department accounted for six to seven percent of its total retail sales in Denver, but sales of La-Z-Boy chairs represented only half of one percent of its Denver sales. Rec. XII, at 2028-30.

In 1974 and 1975, World of Sleep experienced substantial success in selling La-Z-Boy chairs. However, so did Montgomery Ward. While the evidence at trial indicated that World of Sleep gained an increasingly large share of the total sales of La-Z-Boy reclining chairs in the Denver area as a result of its aggressive discount advertising, there was no discernable impact upon Montgomery Ward because its own La-Z-Boy reclining chair sales were increasing at the same time. Gene Spilo, Montgomery Ward's district merchandiser in Denver, testified:

> Q [Mr. Gentry] . . . We were talking about the impact that World of Sleep had on Montgomery Ward's La-Z-Boy sales, and do you know whether or not there was any impact on Montgomery Ward's La-Z-Boy sales?
>
> A [Mr. Spilo] I don't think so.
>
> Q What do you base that on?
>
> A Because our sales were increasing.
>
> Q And did they increase between 1973 and 1977?
>
> A As far as I can recall.

Rec. VII, at 968.

Montgomery Ward's Complaint About World of Sleep's Comparison Advertising

In the summer of 1975, World of Sleep ran a television advertisement featuring a Montgomery Ward catalog page in the hands of a World of Sleep employee, who said that the customer could buy the same chair from World of Sleep at a lower price. Rec. III, at 306-08. Montgomery Ward objected to the use of its name in an advertisement of this type on the ground that it was unethical, and complained about the matter to La-Z-Boy. Rec. VII, at 1046-47. La-Z-Boy in turn asked World of Sleep to stop using Montgomery Ward's name in its advertising, and World of Sleep agreed to do so. Rec. III, at 306-08.

Montgomery Ward believed that name comparison ads were unethical because of the misleading impression concerning values offered to the customer based upon a comparison of only one specific item with another. Rec. VI, at 912-15, 917-18. As Montgomery Ward's Denver buyer testified at trial, name comparison ads create the false impression that the entire merchandise line of a particular competitor is offered at the same cost saving. Rec. XII, at 2057.

There is no evidence that Montgomery Ward's complaint in the summer of 1975 was motivated by anything other than its belief that the name comparison advertising by World of Sleep was unethical. It never complained about the prices charged by World of Sleep for La-Z-Boy chairs. Rec. V, at 685-87. It never objected to any of World of Sleep's price promotions, nor to its method of advertising except for the one instance in which Montgomery Ward's name was specifically used. Rec. V, at 684-89. There was no impact of any kind on World of Sleep's sales of La-Z-Boys. World of Sleep continued to buy from La-Z-Boy as many chairs as it

wanted, and its volume of sales of La-Z-Boy chairs continued to increase. Rec. V, at 687.

In March 1976, Mauldin opened a Showcase Shoppe in Denver, devoted exclusively to the sale of La-Z-Boy chairs. Rec. XII, at 2067. World of Sleep had learned some months prior to this time that a new competitor was contemplated for Denver, and had asked La-Z-Boy that World of Sleep be allowed to own the Showcase Shoppe. However, World of Sleep was not selected by La-Z-Boy. Rec. V, at 631-32.

The entry of this new competitive force into the Denver market triggered a price war by World of Sleep against Showcase Shoppe. Rec. III, at 300. There was no objection by Montgomery Ward to this advertising, which featured substantial price reductions on La-Z-Boys. Nor did Montgomery Ward object to the entry of the Showcase Shoppe into the Denver market. Rec. V, at 692. Indeed, Montgomery Ward's only involvement in the Denver situation came when World of Sleep again resorted to comparative advertising using a Montgomery Ward catalog page, again raising the issue of the ethics of this type of advertising. Rec. VI, at 912-13.

A copy of the comparative ad, which appeared in a Denver newspaper, was sent from Montgomery Ward's district office in Denver to its home office in Chicago, with a note saying, "Look what's happening in Denver." Rec. VII, at 973. When the note was received by Al Weissenstein, the reclining chair buyer for Montgomery Ward, he telephoned Robert Rall of La-Z-Boy with a simple request that World of Sleep be asked not to run newspaper advertisements featuring Montgomery Ward's catalog. Rec. VI, at 915. This complaint was made in mid-June, 1976, three weeks after La-Z-Boy had put World of Sleep on a credit hold because it was past due on several invoices aggregating more than $45,000. Rec. III, at 309-10; Rec. XIII, at 2307; Exhibit 21.

The Hearsay Statements of Robert Rall

World of Sleep's characterization of Montgomery Ward's complaint as part of a price fixing conspiracy is supported entirely by two telephone conversations in June 1976 between Thomas Hansen, World of Sleep's president, and Robert Rall, La-Z-Boy's vice president of marketing, which Hansen secretly recorded. Rall is the individual that World of Sleep called a liar in its brief to the Court of Appeals below. Brief for World of Sleep at 28 (excerpt reprinted in the Appendix to this Brief, at 1a).

In the first of these taped conversations, Exhibit 2, Appendix to Cross Petition at 38a-54a, which occurred on June 16, 1976, Rall mentioned a complaint by Montgomery Ward, but did not ascribe any specific content to it. When Rall later testified under oath in this case, he stated that the complaint from Montgomery Ward was about the ethics of the name comparison advertising, on the ground that Montgomery Ward did not believe this type of advertising was clean. Rec. VII, at 1102.

In the second taped conversation with Hansen, Exhibit 3, Appendix to Cross Petition at 55a-59a, which occurred on June 23, 1976, Rall said that he had just come from a four and one half hour meeting in Chicago with Jim Lutz, a vice president at Montgomery Ward. Rall told Hansen on the telephone that Lutz had the World of Sleep ad pinned up on his wall and "he almost pinned me up on the wall, too." When Rall testified under oath, however, he admitted that no such meeting with Lutz had ever occurred. Rec. VII, at 1099, 1101-02. This was confirmed by Lutz himself, Rec. XII, at 2014, as well as by Weissenstein, Rec. VI, at 916-17. Lutz testified that no problem involving La-Z-Boy was ever brought to his attention during his ten years as vice president of Montgomery Ward, and that he had never even heard of World of Sleep until after litigation was instituted by

World of Sleep and Lutz had received a subpoena for his deposition. Rec. XII, at 2011-12.

The Limited Scope of Montgomery Ward's Involvement

World of Sleep never contended, and did not present any evidence at trial, that Montgomery Ward was in any way responsible for the credit hold on World of Sleep imposed by La-Z-Boy in May 1976. There was no evidence of any contact between Montgomery Ward and La-Z-Boy concerning World of Sleep after June 1976, nor was there any evidence of any contact at any time between Montgomery Ward and Mauldin on any subject.

REASONS FOR DENYING THE WRIT

Review by this Court on a writ of certiorari is not a matter of right but is granted in this Court's discretion only when there are "special and important reasons therefor." Sup. Ct. R. 17. The reasons listed in Rule 17 include a conflict between the decision of the Court below and the decision of another Court of Appeals on the same question, the presence of an important question of federal law that has not been but should be settled by this Court, and a decision below that is in conflict with the applicable decisions of this Court.

World of Sleep's cross petition raises no question that falls into any of these categories, or any question of a similar character.

I. THIS CASE DOES NOT REPRESENT A CONFLICT AMONG THE CIRCUITS THAT JUSTIFIES THIS COURT'S REVIEW.

World of Sleep is correct in asserting that the Courts of Appeals differ as to whether hearsay, such as the tape recorded telephone conversations in this case, should itself be considered in determining whether it is admissible against a co-conspirator under Rule 801(d)(2)(E) of the Federal Rules of Evidence. Rule 104 of the Federal Rules of Evidence requires the trial judge to make that

determination without being "bound by the rules of evidence except those with respect to privileges." Fed. R. Evid. 104(a). All twelve Circuits have considered this question; ten have held that the hearsay in question should not be considered and two have said that it is not an error for the trial judge to consider it. Cross Petition at 24-27.[3]

Not all disagreements among Courts of Appeals justify certiorari, however. Such a writ will be granted only when there is a "real and embarrassing conflict of opinion and authority" among them. *Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 79 (1955). The disagreement among the Courts of Appeals relied upon by World of Sleep falls far short of that standard.

Ten of the Circuits, including the Court of Appeals below, have concluded that, before a statement of one co-conspirator is to be admitted against another co-conspirator who was not present when the statement was made, the conspiracy and the participants should be shown by "independent" evidence, that is, evidence other than the hearsay statement sought to be admitted. In so doing, the Courts of Appeals in those Circuits followed the rule set down by this Court in *Glasser v. United States*, 315 U.S. 60 (1942), prior to the adoption of Rule 104:

> [S]uch declarations are admissible over the objection of an alleged co-conspirator, who was not present when they were made, only if there is proof *aliunde* that he is connected with the conspiracy. . . . Otherwise, hearsay would lift itself by its own bootstraps to the level of competent evidence.

315 U.S. at 74-75 (citations omitted).

In applying this principle after the adoption of Rule 104, the Court of Appeals below followed the landmark

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[3] For the convenience of the Court, citations to the leading cases in the various Courts of Appeals are set forth in the Appendix to this Brief, at 1a-3a.

case of *United States v. James*, 590 F.2d 575, 580-81 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979), and its own earlier opinions, *United States v. Petersen*, 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980), and *United States v. Andrews*, 585 F.2d 961, 964 (10th Cir. 1978). In so doing, it did not fail to follow Rule 104. It did not refuse to consider inadmissible evidence in making its determination. It simply refused to consider the evidence in question itself. In the words of this Court, it did not let the tape recorded telephone conversations "lift [themselves] by [their] own bootstraps" into admissible evidence against Montgomery Ward.[4]

Even the Court of Appeals for the First Circuit, one of the two Circuits that has found that it was not error for trial judges to consider the proferred hearsay evidence, has admonished them to "give little weight to bootstrap evidence in deciding whether to admit hearsay under the co-conspirator exception." *United States v. Petrozziello*, 548 F.2d 20, 23 n.2 (1st Cir. 1977).

Thus, the Court of Appeals below applied the law as stated by the Courts of Appeals for the vast majority of the circuits in this country and consistent with the latest pronouncement of this Court on the subject. This does not present a "real and embarrassing conflict of opinion" that justifies the issuance of a writ of certiorari.

II. THIS CASE DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN BUT SHOULD BE SETTLED BY THIS COURT.

The Court of Appeals affirmed the judgment for Montgomery Ward because the record contained "insufficient

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[4] *See United States v. Alvarez*, 584 F.2d 694, 697 (5th Cir. 1978) ("the preliminary determination commanded by *Glasser* rejects evidence not based upon its admissibility but according to whether such evidence is *independent* of the proffered hearsay").

independent evidence of Montgomery Ward's participation in the alleged conspiracy to permit the admission of co-conspirator's hearsay statements" and the "independent evidence, standing alone, was not enough to allow this issue to go to the jury." 756 F.2d 1475; Appendix to Cross Petition at 15a. This does not raise an important question of federal law. World of Sleep is simply asking this Court to review the evidence and reach the opposite conclusion.

Significantly, in its review of the evidence, World of Sleep refers extensively to statements from the tape recordings themselves, Cross Petition at 14-23—exactly the bootstrapping approach that the Court of Appeals correctly rejected. A few examples will suffice to make the point.

1. World of Sleep emphasizes that "[i]n this case an actual, not inferred, agreement to fix prices existed: 'I extracted a promise from Mr. Mauldin that he'd get his prices up and keep them up'." Cross Petition at 15, 24. World of Sleep does not disclose, however, that this statement occurred in one of the taped conversations that the Court of Appeals found to be inadmissible as to Montgomery Ward. Appendix to Cross Petition at 39a.

2. "I got pinned to the wall; I took a beating over there; I feel a little bludgeoned right now" are, according to World of Sleep, statements that are "not hearsay as to Rall's reaction" to a meeting allegedly held at Montgomery Ward.[5] Cross Petition at 17. But these statements all come from a recorded conversation, Appendix to Cross Petition at 55a-56a, and constitute part of the hearsay evidence in question—not independent evidence of anything.

3. World of Sleep claims that the statement "[o]ur plan is to leave you right there [on credit

[5] The controversy over whether such a meeting ever really occurred is summarized in the Statement of the Case, at 6-7 above.

> hold] until we can figure out exactly what's gonna happen" is evidence that La-Z-Boy terminated World of Sleep as a result of Montgomery Ward's complaint about the ads. Cross Petition at 23. Again, World of Sleep fails to disclose that this statement comes from the tape recorded conversations, Appendix to Cross Petition at 56a, and is part of World of Sleep's effort to use the hearsay recordings to bootstrap themselves into admissible evidence.

When the tape-recorded conversations are excluded, the evidence shows no more than that Montgomery Ward complained on two occasions about advertising in which World of Sleep used Montgomery Ward's name, and even then Montgomery Ward only asked that the advertising be stopped. There is not a scintilla of evidence in the record, let alone substantial independent evidence, that Montgomery Ward ever asked or even suggested that La-Z-Boy stop selling to World of Sleep.

On the occasion of Montgomery Ward's first complaint—a year before the events on which World of Sleep relies—the ads stopped. On the second occasion, La-Z-Boy, unknown to Montgomery Ward, had already placed World of Sleep on a credit hold that restricted World of Sleep's access to additional La-Z-Boy chairs. There is no evidence that Montgomery Ward had anything to do with the credit hold. There is no evidence that Montgomery Ward complained about the Showcase Shoppe's entry into the Denver market or about the price war between the Showcase Shoppe and World of Sleep or about World of Sleep's pricing policies. Nor, contrary to World of Sleep's assertions, was Montgomery Ward disturbed by World of Sleep's competition. Montgomery Ward did not see its sales of reclining chairs fall in response to that competition. It did not regard La-Z-Boy's chairs as its principal line of reclining chairs because they were aimed at the high end of the market. In fact, reclining chairs were not an important part of

its business in Denver because they accounted for less than one half of one percent of its sales in that market.

Thus, the Court of Appeals correctly characterized the independent evidence as follows:

> The only independent evidence of a conspiracy between them [Montgomery Ward and La-Z-Boy] is precisely that which was held to be insufficient to raise a conspiracy fact issue in *Monsanto* [*Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984)]—complaints by a dealer who competes with the price cutting plaintiff, and action in response by the manufacturer adverse to the price cutter.

756 F.2d 1475; Appendix to Cross Petition at 15a. The Court of Appeals then concluded, following this Court's teachings in *Monsanto*, that the evidence "does not tend to exclude the possibility that La-Z-Boy and Montgomery Ward were acting independently" so it did not show that a conspiracy existed and the taped telephone conversations were not admissible against Montgomery Ward. This conclusion, based upon the Court of Appeals' review of the facts in the record, does not present an important question of federal law that should be settled by this Court.

III. THIS CASE DOES NOT INVOLVE A FEDERAL QUESTION THAT HAS BEEN DECIDED IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT.

In an effort to convert the Court of Appeals' review of evidence into a legal determination worthy of this Court's review, World of Sleep suggests that the Court of Appeals' decision is in conflict with two Supreme Court cases, *Monsanto Co. v. Spray-Rite Service Corp.*, 104 S. Ct. 1464 (1984) and *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962). These contentions will be discussed separately.

A. The Court of Appeals Did Not Misread the Teaching of *Monsanto*.

World of Sleep asserts that the Court "superimpose[d] the entire *Monsanto* standard on the 'substantial independent evidence' requirement of the co-conspirator rule" and apparently complains that this excludes the use of any hearsay evidence to prove a case under the *Monsanto* standard. Cross Petition at 14.

This mischaracterizes the Court of Appeals' reasoning. In its opinion, the Court of Appeals simply looked to *Monsanto* to determine the elements of the conspiracy to be proved and then looked to the independent evidence to see whether those elements were shown. Nowhere did the Court indicate that, if substantial independent evidence existed to show the elements of a conspiracy required by *Monsanto*, hearsay statements would not then be admissible to form additional evidence to be considered by, and perhaps persuade, the jury. 756 F.2d 1474-75; Appendix to Cross Petition at 13a-16a. The Court of Appeals merely held that the tapes were inadmissible because the only independent evidence of a conspiracy between Montgomery Ward and La-Z-Boy was Montgomery Ward's complaints about La-Z-Boy's ads—"precisely that which was held to be insufficient to raise a conspiracy fact issue in *Monsanto*." 756 F.2d at 1475; Appendix to Cross Petition at 15a. This is a correct reading of this Court's teaching in *Monsanto*, not a decision in conflict with it.

B. The Court of Appeals Did Not Fragment a Single Conspiracy into Separate Conspiracies in Violation of *Union Carbide*.

In another effort to convert the Court of Appeals' analysis of the evidence into legal error, World of Sleep asserts that the Court of Appeals' approach was "to fragment or compartmentalize the evidence of conspiracy" in violation of this Court's opinion in *Continental*

Ore Co. v. Union Carbide & Carbon Corp., 370 U.S. 690 (1962), in which the Court stated that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." 370 U.S. at 699.

The Court of Appeals did nothing of the sort. It viewed the evidence as a whole, including the taped telephone conversations, and concluded that the totality of this evidence entitled World of Sleep to go to the jury. Because the taped conversations were admissible against La-Z-Boy, the Court of Appeals held that the case was properly submitted to the jury as to that defendant. 756 F.2d at 1475-76; Appendix to Cross Petition at 16a-17a. However, because the taped conversations were inadmissible against Montgomery Ward, the Court of Appeals reviewed separately the remaining evidence and held that an insufficient showing of conspiracy had been made by World of Sleep. On this basis, it affirmed the judgment in favor of Montgomery Ward. 756 F.2d at 1473-75; Appendix to Cross Petition at 11a-16a.[6]

The Court of Appeals' decision represents nothing more than the common situation in litigation in which a plaintiff is able to produce sufficient evidence to go to a jury against one defendant but insufficient evidence to go to a jury against others. There is nothing in this conclusion that is in conflict with *Union Carbide* or any other decision of this Court.

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[6] The Court affirmed the judgment in favor of Mauldin for the same reason.

CONCLUSION

The Court of Appeals affirmed the judgment in favor of Montgomery Ward after it applied well-settled principles of evidence to the facts in the record. Its ruling in this regard presents no issue that justifies this Court's review. The writ should be denied.

Respectfully submitted,

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APPENDIX

EXTRACT FROM WORLD OF SLEEP'S BRIEF TO THE UNITED STATES COURT OF APPEALS FOR THE 10TH CIRCUIT, PAGE 28

The evidentiary references in the Statement of Facts make it indisputable that the actions of La-Z-Boy and Montgomery Ward were price orientated. World of Sleep declared a "Price War on La-Z-Boys" and it compared Montgomery Ward's high prices to its own lower prices in the newspapers; it drastically cut Showroom Shoppe's prices. La-Z-Boy was concerned that its La-Z-Boy dealer could not maintain high enough prices to make a profit "for a good manufacturer-dealer relationship to exist" if it engaged in a contest with World of Sleep. Montgomery Ward couldn't compete with World of Sleep's low prices; they didn't have to. Instead they "asked" a $12,000,000 question, "can't you get the guy to stop?" According to Rall, he wasn't just asked, he was called in for a "command performance" where he got "kicked in the ass" and "really took a beating over there." It is no wonder he lied to Montgomery Ward when he reported back, sir, "he said he wouldn't do it."

LEADING CASES BY CIRCUIT CONSTRUING FEDERAL RULE OF EVIDENCE 104(a)

Circuits holding that a trial judge may not consider the hearsay statements themselves in determining admissibility:

Second Circuit: *see United States v. Terry*, 702 F.2d 299, 320 (2d Cir.), *cert. denied*, 461 U.S. 931 (1983); *United States v. Alvarez-Porras*, 643 F.2d 54, 57 (2d Cir. 1981), *cert. denied*, 454 U.S. 839 (1981); *United States v. Ziegler*, 583 F.2d 77, 79 (2d Cir. 1978).

Third Circuit: *see United States v. Gibbs*, 739 F.2d 838, 843 (3d Cir. 1984), *cert. denied*, 105 S. Ct.

779 (1985); *United States v. Trotter*, 529 F.2d 806, 811 (3d Cir. 1976).

Fourth Circuit: *see United States v. Talbert*, 706 F.2d 464, 468 (4th Cir. 1983); *United States v. McCormick*, 565 F.2d 286, 289 (4th Cir. 1977), *cert. denied*, 434 U.S. 1021 (1978); *United States v. Stroupe*, 538 F.2d 1063, 1065 (4th Cir. 1976).

Fifth Circuit: *see United States v. Marbury*, 732 F.2d 340, 401 (5th Cir. 1984); *United States v. James*, 590 F.2d 575, 580-81 (5th Cir.), *cert. denied*, 442 U.S. 917 (1979); *United States v. Alvarez*, 584 F.2d 694, 697 (5th Cir. 1978).

Seventh Circuit: *see United States v. Regilio*, 669 F.2d 1169, 1174 (7th Cir. 1981), *cert. denied*, 457 U.S. 1133 (1982).

Eighth Circuit: *see United States v. Fahnbulleh*, 748 F.2d 473, 476 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 2685 (1985); *United States v. Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978).

Ninth Circuit: *see United States v. Miranda-Uriarte*, 649 F.2d 1349 (9th Cir. 1981); *United States v. Batimana*, 623 F.2d 1366, 1368 (9th Cir.), *cert. denied*, 449 U.S. 1038 (1980).

Tenth Circuit: *see United States v. Petersen*, 611 F.2d 1313, 1330 (10th Cir. 1979), *cert. denied*, 447 U.S. 905 (1980); *United States v. Andrews*, 585 F.2d 961 (10th Cir. 1978).

Eleventh Circuit: *see United States v. Monaco*, 702 F.2d 860, 876 (11th Cir. 1983).

D.C. Circuit: *see United States v. Jackson*, 627 F.2d 1198, 1214-15 (D.C. Cir. 1980).

Circuits holding that a trial judge may consider the hearsay statements themselves in determining the question of admissibility:

First Circuit: *see United States v. Drougas*, 748 F.2d 8, 29 (1st Cir. 1984); *United States v. Martorano*, 557 F.2d 1, 12 (1st Cir. 1977), *cert. denied*, 435 U.S. 922 (1978);

Sixth Circuit: *see United States v. McCullah*, 745 F.2d 350, 358 (6th Cir. 1984); *United States v. Vinson*, 606 F.2d 149, 153 (6th Cir. 1979), *cert. denied*, 444 U.S. 1074 (1980).

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NO. 85-64 (3)

In The

Supreme Court of the United States

October Term, 1985

WORLD OF SLEEP, INC.
Cross Petitioner

v.

LA-Z-BOY CHAIR COMPANY;
MONTGOMERY WARD & CO., INC.; and
ARTHUR MAULDIN, individually and
d/b/a LA-Z-BOY SHOWCASE SHOPPE
Cross Respondents

BRIEF OF LA-Z-BOY CHAIR COMPANY IN OPPOSITION TO CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

As to cross respondent La-Z-Boy Chair Company, only cross petitioner's question number 4 is relevant:

> Whether the evidence supported the jury verdict in favor of World of Sleep based on an unlawful price discrimination under the Robinson-Patman Act.

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BRIEF OF LA-Z-BOY CHAIR COMPANY IN OPPOSITION TO CROSS PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

STATEMENT OF THE CASE

A detailed statement of the case is set forth in cross respondent's petition for a writ of certiorari, No. 84-1893, and is incorporated by reference herein.

With respect to World of Sleep's Robinson-Patman claim, the proofs showed that La-Z-Boy originally sold one line of action chairs, the Charter line, to furniture stores. In the late 1960's La-Z-Boy developed the more exclusive Americana line to sell to chain and department stores which had not previously carried La-Z-Boy products (R. XIV, 2414). La-Z-Boy promoted the Charter line extensively through national and local advertising programs (R. XV, 2559). Because chain and department stores preferred to do their own local advertising, La-Z-Boy established a promotional allowance for each Americana chair purchased provided the dealer proved that it actually spent the money on promotion. This allowance, originally $2.25 per chair, then $3.00 per chair, then dropped in 1979, was set at a rate which approximated the per chair advertising expenditures made directly by La-Z-Boy on the Charter line (R. XV, 2526, 2697; R. XII, 1970). Montgomery Ward purchased the Americana line and received the promotional allowance. World of Sleep's president, Thomas Hansen, was aware of the distinction between the two lines from his prior experience and chose the more established Charter line when he began carrying La-Z-Boy in Denver in 1974 (R. IV, 558-63). World of Sleep thus received only promotional aids during the approximately three years as a La-Z-Boy dealer.

In its complaint, World of Sleep alleged that La-Z-Boy's provision of an advertising allowance on only one line of chairs violated Section 2(e) of the Robinson-Patman Act, 15 USC §13(e). The only evidence of injury from this alleged

discrimination offered by World of Sleep, however, was the testimony of Melinda Harper. Ms. Harper multiplied the advertising allowance by the number of La-Z-Boy chairs actually purchased by World of Sleep and projected hypothetical purchases after World of Sleep ceased ordering from La-Z-Boy (R. XII, 1966-68). In his closing argument to the jury, World of Sleep's counsel similarly argued that the $3.00 per chair advertising allowance was "a matter of reduced cost for every chair that World of Sleep would have sold and could have sold in the market were they permitted to stay there," and that the jury should simply "take that $3.00 and simply multiply it by the number of chairs that World of Sleep did not sell during the time they were entitled to that, and I think the figure is $10,749, . . . you simply have to multiply the number of chairs sold times the $3.00." (R. XVII, 3034, 3038). This was the only theory on which World of Sleep submitted a Robinson-Patman claim for damages to the jury.

The jury returned a verdict of $40,000 for World of Sleep on its Robinson-Patman claim, apparently awarding World of Sleep the amount claimed as lost automatic damages on actual purchases, together with automatic damages for some, but not all, of the prospective purchases claimed after 1976.

On appeal, the Tenth Circuit, applying this Court's rationale in *J. Truett Payne Co.* v. *Chrysler Motors Corp.*, 451 U.S. 557 (1981), reversed the award of damages under the Robinson-Patman Act. The court found the record devoid of evidence of actual injury required for recovery of damages under Section 4 of the Clayton Act, 15 U.S.C. §15:

> Under the Supreme Court's analysis [in *J. Truett Payne*], a plaintiff must show more than that he failed to receive a promotion allowance. He must show that this disadvantage adversely affected his ability to compete with favored competitors, because this is the competitive injury the Robinson-Patman Act was intended to prevent. . . .

> . . . World of Sleep presented no evidence that the allowance enabled favored competitors to lower their prices and divert sales, or that it had to lower its prices to an unprofitable level in response to such low prices. There is no evidence that the higher price World of Sleep paid for La-Z-Boy chairs had any other adverse impact on its activity in the marketplace. . . .
>
> . . . In view of the complete absence of record evidence that the alleged Robinson-Patman discrimination had any detrimental effect on World of Sleep's ability to do business, its damage claim for this violation should not have gone to the jury.

25a-27a, 756 F.2d at 1480.

REASONS THE PETITION SHOULD BE DENIED

As set forth in its statement of questions presented, the portion of World of Sleep's cross petition dealing with its Robinson-Patman Act claim simply requests this Court to review the record to determine whether there was sufficient evidence to support the jury's verdict. This issue is not claimed to involve either an important question of federal law or a conflict in the decisions of the Circuit Courts of Appeal. Quite the contrary is true. As the Court of Appeals properly held, World of Sleep submitted its Robinson-Patman claim to jury solely on the "automatic damages" theory squarely rejected by this Court in *J. Truett Payne*, a decision incredibly not even cited by World of Sleep in its cross petition. The Circuits have had no difficulty in uniformly applying the logical rationale of *J. Truett Payne*, and World of Sleep has presented no reason for this Court to revisit that recent decision.

ARGUMENT

In *J. Truett Payne*, this Court rejected a claim identical to that advanced by World of Sleep in the district court:

> Petitioner first contends that once it has proved a price discrimination in violation of Section 2(a) it is entitled at a minimum to so-called "automatic damages" in the amount of the price discrimination. . . . It insists . . . that the jury should be permitted to infer the requisite injury and damage from a showing of a substantial price discrimination. . . . We disagree.

451 U.S. at 561 (footnote omitted). This Court based its conclusion upon the reasoning of *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477 (1977), and held that "proof of a violation does not mean that a disfavored purchaser has been actually 'injured' within the meaning of Section 4" of the Clayton Act, 15 U.S.C. §15. 451 U.S. at 562. This Court has recently reiterated the *J. Truett Payne* rule requiring some showing of actual injury rather than "automatic damages." *Falls City Industries* v. *Vanco Beverage, Inc.*, 460 U.S. 428, 435-36 nn. 5, 6 (1983).

Before the district court, World of Sleep claimed only that impact on its business from the different advertising allowances was self-evident. The Court of Appeals properly rejected this as the "automatic damages" theory invalidated by this Court in *J. Truett Payne*.

The decision of the Court of Appeals was entirely consistent with those of other courts following *J. Truett Payne*. On remand in *J. Truett Payne*, the Fifth Circuit held that the evidence of actual injury in that case was insufficient to support a damage award even based on the somewhat relaxed rules which apply once the plaintiff has shown the fact of damage:

> Price difference without more does not indicate the amount of lost sales or profits. Self-serving and unsupported assumptions cannot sustain a calculation of going

> concern value. The burden of putting forth substantial evidence is not satisfied by mere speculation and guesswork.

Chrysler Credit Corp. v. *J. Truett Payne Co.*, 670 F.2d 575, 582 (5th Cir. 1982).

The same result was reached on facts similar to the present case in *Interstate Cigar Co.* v. *Sterling Drug, Inc.*, 655 F.2d 29 (2d Cir. 1981). In *Interstate Cigar* the defendant allegedly violated Sections 2(a) and 2(e) of the Robinson-Patman Act by offering a 25% discount to new distributors who had never before handled its products and by allowing distributors other than the plaintiff to take advantage of certain return allowances. The district court dismissed the claims and the Court of Appeals affirmed in the following language:

> Secondly, plaintiffs failed to introduce substantial evidence showing that they were actually injured by defendants' new distributor discount policy. Plaintiffs' theory, that they were entitled to "automatic damages," has been rejected by the Supreme Court, which requires a plaintiff to make a showing of actual injury attributable to a violation of the Robinson-Patman Act.

655 F.2d at 31.

Similarly, in *Allen Pen Co.* v. *Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981), court rejected the automatic damage claim and held that the evidence was insufficient to support a jury verdict on the basis of actual injury resulting from the alleged discrimination. The court stated:

> Our search of the record, however, reveals no evidence that specifically shows or even tends to show that any competitor drew either profits or sales away from Allen Pen. . . . And, the evidence of price difference, for the reasons previously mentioned, is not by itself sufficiently strong to warrant an inference of actual injury. In fact,

> none of the damage theories that Allen Pen proposed to the district court referred to the business activity of a competitor.

653 F.2d at 22 (citations omitted).

In *Olympia Co.* v. *Celotex Corp.*, 597 F.Supp. 285 (E.D. La. 1984), Olympia based its damage claim on an average differential of 5% between the prices it and its competitor paid for Celotex's roofing materials. The court rejected this approach noting that "damages must be proven rather than presumed on the basis of price differential. . . ." 597 F. Supp. at 298, citing *J. Truett Payne*.

In its present cross petition, World of Sleep belatedly attempts to cure the defects in its proofs by arguing that had it received the advertising allowance, it could have (1) lowered its prices, (2) advertised more in an effort to capture more business, or (3) pocketed the allowance as extra profit. Cross petition at 29. The problem with this argument is that there is nothing in the record, and World of Sleep points to nothing, indicating that it had any intention to exercise either the first or second of these options. Nor is there any evidence or even conjecture concerning the effect had it done so. World of Sleep has never argued that its advertising expenditures were inadequate or that its prices were too high to allow it to compete effectively with Montgomery Ward or Mauldin. Indeed, what little evidence there was tended to show that World of Sleep's prices were below those of Wards and Mauldin and its advertising more extensive. As the Court of Appeals noted, World of Sleep attributed its difficulties with La-Z-Boy chairs solely to its inability to obtain adequate supplies of chairs. The third option, pocketing the allowance as extra profit, is the only one which was the subject of any evidence or argument at trial; it is the discredited "automatic damages" theory in its clearest form.

CONCLUSION

In Part IV of its cross petition, unlike La-Z-Boy's petition for a writ of certiorari, World of Sleep has identified neither an important question of federal law nor a conflict in the decisions of the Circuit Courts of Appeal. For this and all of the foregoing reasons, World of Sleep's cross petition for a writ of certiorari should be denied.

Respectfully submitted,

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